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Lessius, Partnerships and the *Contractus Trinus*

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In Defense of Commercial Capitalism: Lessius, Partnerships and the *Contractus Trinus*

by Wim Decock¹

Abstract

In telling the history of commercial law and capitalism, traditional scholarship has often neglected the abundant literature on commerce and contracts written by Catholic theologians in the sixteenth and seventeenth centuries. To shed light on this ‘hidden story’ in the history of commercial law and capitalism, this paper will explore the attitude of one such theologian, Leonard Lessius (1554-1623) from Antwerp, toward the emerging world of capitalism. The more specific focus of attention will be on Lessius’ analysis of a sophisticated commercial technique used to circumvent the usury prohibition: the so-called ‘triple contract’ (*contractus trinus*). By means of a triple contract, which could be analyzed as a combination of a partnership, an insurance and a sale contract, capitalists safely invested their money in commercial enterprises at a fixed annual profit rate. While many jurists, theologians and legislators opposed this type of contract, since it resembled an implicit and usurious money-loan, Lessius eagerly defended sophisticated legal constructions such as the triple contract. His remarkable cost-benefit analysis of the triple contract developed into a startling defense of commercial capitalism in the literal sense of the word: the investment of capital in commercial activities for the sake of making profit. On the basis of moral, legal and economic policy arguments, Lessius promoted the investment of private wealth in safe commercial credit contracts rather than prohibit this widespread practice. The conclusion of this paper is that, although capitalism may not have emerged from the mind of any theologian at all – whether Protestant or Catholic – the *legitimation* of capitalism was assured by Catholic theologians such as Lessius.

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Overview

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1. Introduction: The Hidden Story in the History of Company Law

The aim of this contribution is to draw attention to the literature on commerce, particularly on the partnership contract (*societas*), in the Catholic moral theological tradition that flourished in Antwerp at the dawn of the seventeenth century. Since this type of literature is not frequently considered in mainstream histories of commercial law, it is almost like a 'hidden story' in the history of company law. However, eminent scholars have convincingly shown that ignoring the religious and theological origins of the Western legal tradition comes at a high price, also if one wishes to understand the history of company law². Since time immemorial, partnerships were concluded in a context of family relationships, friendships, and communities that shared fundamental values and religious views. Carlos Petit, one of the leading experts in the history of commercial law, has argued a bit provocatively that it was a shared culture of Christian values that constituted the *usus et consuetudo mercatorum* of the past³. Hence, it radically differed from the modern notion of 'universal mercantile custom' or *lex mercatoria*⁴.

² E.g. B. Clavero, *Antidora, Antropología católica de la economía moderna*, [Per la storia del pensiero giuridico moderno, 39], Milano 1991; R. Savelli, *Modèles juridiques et culture marchande entre 16e et 17e siècles*, in: F. Argiolini – D. Roche (eds.), *Cultures et formations négociantes dans l'Europe moderne*, [Civilisations et Sociétés, 91], Paris 1995, p. 419; J.Q. Whitman, *The moral menace of Roman law and the making of commerce, Some Dutch evidence*, The Yale Law Journal, 105 (1996), p. 1841-1889; U. Santarelli, *La prohibición de la usura, de canon moral a regla jurídical, Modalidades y éxitos de un transplante*, in: C. Petit (ed.), *Del ius mercatorum al derecho mercantil*, Madrid 1997, p. 237-256; A. Hespanha, *Panorama histórico da cultura jurídica europeia*, [Forum da história, 24], Mem Martins 1997, p. 16-22.

³ C. Petit, *Del usus mercatorum al uso de comercio, Notas y textos sobre la costumbre mercantil*, Revista da Faculdade de Direito, Curitiba, 48 (2008), p. 7-38. This is not to downplay the striking similarities between the strategic use of the term *usus et consuetudo mercatorum* in juristic arguments in the present and the past; see W. Decock, *Leonardus Lessius (1554-1623) y el valor normativo de 'usus et consuetudo mercatorum' para la resolución de algunos casos de conciencia en torno de la compra de papeles de comercio*, in: M. Madero – E. Conte (eds.), *Entre hecho y derecho, Tener, poseer, usar en perspectiva histórica*, Buenos Aires 2010, p. 75-94.

⁴ The notion that a universal *lex mercatoria* existed already in the Middle Ages has been cast into doubt by most legal historians who have explored the subject in detail; see, for instance, A. Cordes, *Auf der Suche nach der Rechtswirklichkeit der mittelalterlichen Lex Mercatoria*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germ. Abt., 118 (2001), p. 168-184; Ch. Donahue, Jr., *Medieval and early modern lex mercatoria, An attempt at the probatio diabolica*, Chicago Journal of International Law, 5 (2004), p. 21-37; S. Gialdroni,

This paper will argue that some of the most profound analyses of commercial techniques were offered by theologians and that the purpose of this theological literature was not merely of a theoretical nature. A close-reading of Leonardus Lessius' (1554-1623) exposition on partnership (*De societate*) in his treatise *On Justice and Right (De iustitia et iure)* reveals that Lessius – who was born in Brecht near Antwerp and taught moral theology in Louvain – was highly familiar with commercial practice⁵. Moreover, his ambition was to legitimize the partnership contracts that were concluded in the Antwerp market. Of special concern to jurists and theologians living in Lessius' time was the so-called 'triple' or 'trine' contract (*contractus triplex/trinus*), which was a commercial partnership with capital guarantee and a fixed return rate. For providers of funds it was a safe investment vehicle that also allowed merchants to raise money at relatively advantageous conditions. In this manner, savings could be invested in a productive way without the investor running the risk of violating the usury prohibition.

The fact that theologians were preoccupied with legal matters, particularly concerning contracts and business, might stir surprise. As Max Weber (1864-1920) noted, modern man seems to be unable to escape the tendency to underrate the impact of religion in the history of Western law⁶. Ironically, in his famous book on the history of commercial partnerships (*Zur Geschichte der Handelsgesellschaften im Mittelalter*, 1889), Max Weber devoted little space to canon law and theology. This was probably due to the influence exerted on him by the Lutheran jurist Rudolf Sohm (1841-1917)⁷. Sohm notoriously advocated the thesis that there is a fundamental incompatibility between law and the Christian faith⁸. This 'antinomianist' conception of the 'true' and 'original' Church has had a profound effect not only on 19th and 20th century studies in the history of Catholic moral theology, but also on the historiography of law. Weber's *Geschichte der Handelsgesellschaften* is a case in point.

Studying the theological literature on commerce and contracts can hardly be a priority from a Weberian perspective. For his genealogical study of the ideal, nineteenth century company – characterized by an identifiable 'legal personality' (*Firma*), 'separate entity' (*Sondervermögen*) and 'joint liability' (*Solidarhaftung*) – Weber was not likely to feel inclined to study the moral theologians of the early modern period⁹. Neither was his love for the 'German'

⁵ *Gerard Malynes e la questione della lex mercatoria*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germ. Abt., 126 (2009), p. 38-69. Less sceptical about the existence of a medieval lex mercatoria as such, yet critical of the continuity thesis which sees a direct link between medieval, transboundary norms of commercial law and modern law merchant, is T.J. Röder, *The roots of the 'New Law Merchant', How the international standardization of contracts and clauses changed business law*, in Forum Historiae Iuris (2006), [<http://www.forhistiur.de/zitat/0610roeder.htm>, last visited on 28 March 2012].

⁶ Lessius' familiarity with business practice has been acknowledged both by his contemporaries and by modern scholars; e.g. V. Brants, *L'économie politique et sociale dans les écrits de L. Lessius (1554-1623)*, Revue d'Histoire Ecclésiastique, 13 (1912), p. 308-309, n. 2.

⁷ Quoted in B. Clavero, *Religión y derecho, Mentalidades y paradigmas*, Historia, Instituciones y Documentos, 11 (1984), p. 92.

⁸ G. Dilcher, *Einleitung*, in: G. Dilcher – S. Lepsius (eds.), Max Weber, *Zur Geschichte der Handelsgesellschaften im Mittelalter*, [Max Weber Gesamtausgabe, Abt. 1, Band 1], Tübingen 2008, p. 9.

⁹ G. Agamben, *Opus Dei, Archeologia dell'ufficio*, [Homo Sacer, II. 5], Torino 2012, p. 21-22.

⁹ Dilcher, *Einleitung*, p. 42-43 and p. 71.

roots of commercial law conducive to profound analysis of theological literature¹⁰. The pursuit of uncovering the image of the present in the past does not easily bring a legal historian to pondering the religious context of the history of his field of study¹¹. Yet, Max Weber's take on the history of commercial law set the agenda for mainstream legal historical scholarship to this day. It is small wonder, then, that the moral theological literature on commercial contracts has suffered from scholarly neglect.

Already back in the 19th century, an alternative model for studying the history of commercial law was advocated by Wilhelm Endemann (1825-1899). In his *Studien in der romanisch-kanonistischen Wirtschafts- und Rechtslehre* (1874-1883), Endemann tried to understand the history of the regulation of business from a broader, cultural perspective. Rather than trying to uncover the image of the present in the past, Endemann proposed to take seriously the religious context in which business and business law developed throughout the pre-modern period. For example, he noted that canon law's usury prohibition did not necessarily put a brake on the development of commerce and commercial law. Instead, the prohibition on usurious loans provided an incentive for legal practitioners and theologians to develop innovative techniques of lending and investment that could serve as alternatives to money-loans at interest. Importantly, the partnership (*societas*) provided one of those alternative investment vehicles. Partnership contracts allowed businessmen to raise money for their commercial projects while enabling the capital investor to make lawful profits by parting with his money.

Put differently, Endemann's perspective urges us to see the history of partnership as part of a story that is much wider than the evolution of its technical ingredients. The history of *societas* is part of the story of how money can be lawfully put to its most productive use in a society that was imbued with Christian values. At the same time, Endemann's sensitivity to the religious dimension of regulation of commerce in the pre-modern world opens up a new story in the traditional story of the history of commercial law. Contemporary scholarship tends to make a sharp distinction between 'jurists' and 'theologians', or, for that matter, between 'morality' and 'law'. But Endemann rightly warned that these distinctions are pointless if one tries to understand the work of early modern jurists, for instance Sigismondo Scaccia's (c. 1564-1634) *Tractatus de commerciis et cambio*¹². The same is true of a jurist such

¹⁰ It is worthwhile noting that the conception that there was a peculiar, 'German' legal tradition has come under pressure in recent scholarship, see F. Schäfer, *Juristische Germanistik, Eine Geschichte der Wissenschaft vom einheimischen Privatrecht*, [Juristische Abhandlungen, 51], Frankfurt am Main 2008 ; L. Waelkens, *Droit germanique, La fin d'un mythe ? À propos d'un ouvrage récent*, Revue historique de droit français et étranger, 87 (2009), p. 415-426 ; E. Conte, *Gewere, vestitura, spolium, Un'ipotesi di interpretazione*, in : O. Condorelli – F. Roumy – M. Schmoeckel (eds.), *Der Einfluss der Kanonistik auf die Europäische Rechtskultur*, [Norm und Struktur], Köln-Weimar-Wien 2009, p. 169-191.

¹¹ For similar methodological observations, see A. Cordes – K. Jahntz, *Aktiengesellschaften vor 1807?*, in: W. Bayer – M. Habersack (eds.), *Aktienrecht im Wandel*, Band 1: Entwicklung des Aktienrechts, Tübingen 2007, p. 3-7.

¹² W. Endemann, *Studien in der romanisch-kanonistischen Wirtschafts- und Rechtslehre bis gegen Ende des siebzehnten Jahrhunderts*, Berlin 1874, tom. 1, p. 59: 'Dabei muss bemerkt werden, dass er [sc. Scaccia] und viele andere Juristen stets zweierlei Gerichte (*fora*) im Auge haben. Nicht blos das weltliche Gericht, sondern auch der Beichtstuhl wird als Gericht, Beichte und Absolution als eine Art von gerichtlicher

as Ettore Felici, author of a successful *Tractatus de communione seu societate*. He frequently refers to the canonists and the theologians and is careful to pay attention to the court of conscience (Ettori uses both the terms *forum poli* and *forum conscientiae*), where it deviates from the external court (*forum fori*). Needless to say, the following paragraphs are more indebted to Endemann's than to Weber's methodology for doing legal historical scholarship in the field of commercial law. Even so, this contribution does not necessarily share Endemann's assumption that the Catholic Church played an overall negative role in the development of Western commercial life¹³.

2. *Lessius' Exposition on Partnership*

a. Defining Partnership (*Societas*)

Leonardus Lessius is one of the most famous theologians from the Low Countries¹⁴. He entered the Society of Jesus in 1572 after graduating in the Arts at the University of Louvain and soon taught himself Roman law and canon law as a novice in Saint-Omer and Douai. We are told that his uncle wanted him to make a living as a businessman, but Lessius pursued an academic career within the Jesuit order and eventually became known as the 'Oracle of the Netherlands' on account of his role as a counsellor to the Antwerp merchants and to the Archdukes Albert and Isabella. Franciscus Zypaeus (1580-1650), author of a book on Belgian law (*Notitia iuris belgici*), recommended jurists to consult Lessius to gain a better understanding of the practice of money-exchange at the Bourse of Antwerp¹⁵. According to Zypaeus, Lessius regularly visited the Antwerp market to talk to the most experienced merchants and businessmen. The local magistrates drew on Lessius amongst other sources when compiling the last version of Antwerp customary law, the *Consuetudines compilatae* (1608), particularly in the field of contract law¹⁶.

Prozedur betrachtet. Es gibt also ein Gewissens- oder inneres Forum (*forum conscientiae, interius, animae, poli*), in dem Gott richtet durch den Mund des Priesters, und ein irdisches Gericht (*forum terrestre, fori, exterius*), in dem Menschen urtheilen. In jenem wird nach dem göttlichen und natürlichem Recht, nach der Wahrheit, namentlich nach der wahren Absicht geurtheilt, um Gott genug zu thun; in diesem nach dem weltlichen Gesetz, nach Präsumtionen, die der Wahrheit, welche hier oft verborgen bleibt, vorgehen, um dem Gemeinwesen und den Beteiligten genug zu thun.'

¹³ On Endemann's bias against the Catholic Church, see especially E. Van Roey, *Le contractus germanicus ou les controverses sur le 5%* au XVIIe siècle, *Revue d'Histoire Ecclésiastique*, 3 (1902), p. 904, n. 1.

¹⁴ For biographical references, see T. Van Houdt – W. Decock, *Leonardus Lessius, Traditie en vernieuwing*, Antwerpen 2005, p. 11-54, and W. Decock, *Leonardus Lessius on buying and selling (1605)*, *Translation and introduction*, *Journal of Markets and Morality*, 10 (2007), p. 439-443.

¹⁵ Franciscus Zypaeus, *Notitia iuris belgici*, Antverpiae 1640, lib. 4, tit. *De emptione et venditione*, par. *De cambiis*, p. 111-112: 'Quem virum omni theoria theologica instructissimum constat ex Lovaniensi universitate ex professo Antverpiam venisse, ut cum subtilissimis mercatoribus conferret, de cambiorumque praxi instructus aequitatem dissertando excuteret.'

¹⁶ The allegations to the late scholastic authors have been analyzed in B. Van Hofstraeten, *Juridisch humanisme en costumiere acculturatie, Inhouds- en vormbepalende factoren van de Antwerpse Consuetudines com-*

In Lessius' *On Justice and Right*, concrete moral and legal problems are discussed in the framework of a systematic exposition on property, torts and contracts¹⁷. The structure of the third section of the second book of Lessius' *On Justice and Right*, which treats of contracts, is symptomatic of a shift towards systematic legal thinking that nevertheless preserves a casuistic element. Lessius' treatment of particular contracts is preceded by a chapter on contract law in general (*De contractibus in genere*). The chapter on the partnership contract (*De societate*), in particular, subdivides into four concrete questions (*dubitaciones*)¹⁸:

Book II. On justice

Section III. On contracts

- 17. On contracts in general
- 18. On promise and donation
- 19. On testaments and legacies
- 20. On loan for consumption and usury
- 21. On sale-purchase
- 22. On rents
- 23. On money-exchange
- 24. On lease-hire, emphyteusis and feudal contracts
- 25. On partnership (De contractu societatis)
 - 1. *What a partnership is and in what ways it can be concluded*
 - 2. *How a partnership contract must be concluded in which one party confers his capital and the other party his industry; how the division should be made when the partnership ends*
 - 3. *Whether it is licit to stipulate that the partners guarantee the capital and that they distribute a small and sure annual return instead of a high return which is uncertain*
 - 4. *What damages and costs of the working partner are to be shared in common*
- 26. On games and gambling
- 27. On deposit and loan
- 28. On suretyship, pawn, mortgage

In defining the partnership contract, Lessius borrows from the *ius commune* tradition, but he also puts his own accents. Lessius defines partnership as 'an agreement between two or

¹⁷ *pilatae* (1608) en het *Gelderse Land- en Stadsrecht* (1620), Maastricht 2008, p. 406-410. The *Consuetudines compilatae* have been carefully examined from the point of view of their significance for the development of commercial law in D. De ruysscher, *Naer het Romeinsch recht alsmede den stiel mercantiel, Handel en recht in de Antwerpse rechtbank* (16de-17de eeuw), Kortrijk-Heule 2009.

¹⁸ W. Decock, *La transformation de la culture juridique occidentale dans le premier 'tribunal mondial'*, in: B. Coppein – F. Stevens – L. Waelkens (eds.), *Modernisme, tradition et acculturation juridique*, Actes des Journées internationales de la Société d'histoire du droit tenues à Louvain, 28 mai – 1 juin 2008, [Iuris scripta historica, 27], Brussel 2011, p. 125-135.

¹⁸ Lessius, *De iustitia et iure*, Antverpiae 1621, lib. 2, p. 13-14.

more parties to contribute something for the purpose of common utility or common profit-making (*in usum vel quaestum communem*).¹⁹ What counts in a *societas* is that parties agree to bundle their efforts and to pool resources for a common purpose. In other words, *societas* is not necessarily a ‘corporation’ or a ‘company’. It also comprises ‘associations’ that are not for profit in a strictly commercial sense, such as marriages or the undivided estate of a deceased person. This might strike the modern reader as strange, but it is the common view of partnership contracts as expressed in the Roman, medieval and early modern legal tradition. As a matter of fact, the pre-classical Roman archetype of the commercial partnership was the community of brothers of an undivided *familia* (*erctum non citum*), which guaranteed that families’ assets remained united upon the death of the *paterfamilias*.²⁰

The partnership contract (*societas*) was used as a general framework, then, for a wide range of agreements in which parties chose to bundle their efforts. Lessius distinguishes between different ways in which people can decide to pool their resources depending on the aim of the partnership (*ex parte finis*), on the object of the partnership (*ex parte materiae*), and on the duration of the partnership (*ex parte temporis*).²¹ If scholars decide to share their libraries, then this is a partnership for the sake of mere utility (*ad usum tantum*), while the aim of business is exclusively to make profits (*ad lucrum tantum*). The aim of a marriage partnership is that husband and wife invest goods and labor both for their mutual utility and in order to make profit (*ad utrumque*). Moreover, marriage is a partnership involving all goods (*societas omnium bonorum*). By contrast, when the estate of a deceased person remains undivided, a partnership emerges that has only profits as its object (*societas lucrorum*). Lessius does not go deeper into marriage as a partnership, but Luís de Molina (1535-1600), another famous Jesuit theologian, devoted no less than 22 disputations to marriage as a *societas*. Molina’s analysis of the *societas inter coniuges* developed into a comprehensive study of ‘patrimonial family law’.²²

Citing Antonio Gómez (1501-1561), the most influential sixteenth century professor of Roman law at the University of Salamanca, Lessius emphasizes the consensual nature of *societas*.²³ Partnership contracts are not dependent on the fulfillment of solemnity requirements. This is a traditional element in the understanding of partnership contracts. Classical Roman law put *societas* into the category of contractual obligations that emerge by virtue of *consensus* alone, as is the case with sale-purchase, lease-hire and mandate agreements. Consequently, contributing property or industry is not the basis but the effect of a partnership contract. Lessius further highlights the need for the consent to be externalized and communicated to

¹⁹ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 1, num. 1, p. 334: ‘Societas in proposito est conventio duorum pluriumve ad conferendum aliquid in usum vel quaestum communem contracta. Hic contractus perficitur solo consensu exterius expresso, absque ulla alia iuris solemnitate; ut docet Gomezius (...). Unde collatio bonorum vel operarum in commune non est contractus societatis, sed effectus eius.’

²⁰ R. Zimmermann, *The law of obligations, Roman foundations of the civilian tradition*, Cape Town – Wetton – Johannesburg 1990, p. 451-452.

²¹ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 1, num. 4-6, p. 334-335.

²² Ludovicus Molina, *De iustitia et iure*, Moguntiae 1614, tom. 2, tract. 2, disp. 422-443, cols. 771-864.

²³ Antonius Gomezius, *Commentariorum variarumque resolutionum iuris civilis, communis et regii* tomi tres, Venetiae 1572, tom. 2, cap. 5, num. 1, f. 208r.

the other party. This is a reference to a question that was fiercely debated in his time, namely whether an offer needs to be externalized and accepted to become binding in conscience²⁴.

The consensual nature of partnerships and their *intuitu personae* character notoriously entailed the problem that a partnership could not survive the death of one of the partners²⁵. *Societas* is a contract in which a partner is chosen to participate in a common project by virtue of his specific industriousness (*in hoc contractu industria personae eligitur*)²⁶. Therefore, jurists in the civilian tradition such as Bartolus de Saxoferrato (1313-1357) did not grant parties the freedom to stipulate expressly that the partnership would continue even if a partner died. As law *Adeo* (D. 17,2,59) admonished²⁷: ‘A partnership is so profoundly dissolved by the death of a partner that we cannot even stipulate from the beginning that the heir succeeds the deceased person as a member of the partnership.’ Moreover, Spanish jurists such as Gregorio Lopez, who is mainly known for his 1555 standard gloss on the *Siete Partidas*, argued that concluding such an additional pact ran counter to the freedom of testacy²⁸. If a partner decided to conclude a pact which stipulated that a particular heir would succeed him in the partnership, then he would not be free to change his heir anymore (*libertas mutandi heredem*), as he was bound to the other partners to observe the pact. Consequently, a pact that allows a heir to join the partnership is not only invalid, it also runs against good morals.

However, Lessius realized the inconveniency of this Roman law provision and proposed a typically canonical way of circumventing it. In the footsteps of Molina – but without citing him – Lessius advised partners to take an oath (*iuramentum*) in which they promised that they would perpetuate the partnership contract with the heir of the deceased partner²⁹. In his view, the partners could lawfully enforce such a pact because promissory oaths were binding if they could be performed without endangering the soul. Clearly, observing such an oath could be done without any risk for the soul, since D. 17,2,59 rested merely on human positive law and not on natural law³⁰. In addition, Molina rebuked the idea that a pact instituting a heir as one’s successor in a partnership and which was enforceable by virtue of an oath was

²⁴ W. Decock, *Jesuit freedom of contract*, *Tijdschrift voor Rechtsgeschiedenis*, 77 (2009), p. 442.

²⁵ Zimmermann, *The law of obligations*, p. 456.

²⁶ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 1, num. 5, p. 335.

²⁷ D. 17,2,59 in *Corporis Iustinianae Digestum vetus*, Commentariis Accursii, scholiis Contii, paratitlis Cuja-cii, et quorundam aliorum doctorum virorum observationibus novae accesserunt ad ipsum Accursium Dionysii Gothofredi notae, Lugduni 1604 [=1588] (hereafter: ed. Gothofredi), tom. 1, col. 1706: ‘Adeo morte socii solvitur societas, ut nec ab initio pacisci possimus, ut heres etiam succedat societati.’

²⁸ Cited in Molina, *De iustitia et iure*, Moguntiae 1614, tom. 2, tract. 2, disp. 414, num. 3, col. 740.

²⁹ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 1, num. 6, p. 335: ‘Si tamen socii iuramento promiserunt se continuaturos contractum cum herede, valet pactum, et tenentur eum admittere, quidquid aliqui in contrarium censerint. Ratio est, quia iuramentum servandum est, quando absque salutis dispendio servari potest. Imo eam vim habet, ut contractum iure humano alias irritum, reddat in sua specie validum; ut dictum est supra cap. 17, dub. 7.’

³⁰ Molina, *De iustitia et iure*, Moguntiae 1614, tom. 2, tract. 2, disp. 414, num. 6, col. 742: ‘Quoniam pactum illud, stando in sola natura rei secluso iure humano, quo fit irritum, neque malum est, neque nullum, ut ex se est manifestum; et quoniam, si ex se esset malum et nullum, neque in societate vectigalium admittetur aut esset validum. Quare si iuramento illud servandi corroboretur, obligatio illud servandi consurgit in conscientiae et in exteriori foro, ex tali iuramento, iuxta ea quae disp. 149 et 150 dicta sunt.’

immoral. Although such a pact might go against ‘civil good morals’, Molina argued, it was not opposed to ‘natural good morals’³¹.

b. Four Requirements in Partnership Contracts

According to Lessius, four main criteria must be satisfied for a partnership to be valid. The first requirement is that every single partner must contribute something in the form of either money (*pecunia*), labour (*opera*), industry (*industria*), equipment (*instrumenta*, e.g. a ship or horses), animals (*animalia*), or other goods (*alia bona*)³². At first sight, the partnership involving animals might sound a little bit surprising, but it is obvious that the *societas circa animalia* played a major role in pre-modern societies whose economies were still largely agricultural. For example, Luís de Molina dedicated an entire disputation to this particular kind of partnership in the volume *On Contracts* of his *On Justice and Right*³³. Lessius does not go deeper into partnerships in which animals are shared.

The second requirement says that what is contributed by an individual partner with the intention that it is shared between the partners (*eo animo ut sit commune*) immediately becomes the dominion of every single partner³⁴. Put differently, every single partner becomes a partial *dominus* of the total stake (*sors*) in accordance with his share, or, the *dominus* of a partial *dominium*. By the same token, if a partner acquires something in the name of the partners (*nomine communi*), not in his own name, then every single partner directly becomes a partial *dominus* of this new acquisition. However, this holds only true if there really is an intention to contribute something in common (*animus ut sit commune*). If the capital is not shared (*quando non fit communio in capitali*) and there is mere community of profits, the money that was contributed does not become dominion of all the partners, as is the case in a capital-service partnership where one party invests his capital and the other his industry. Lessius does not use the term ‘*commenda*’ to describe the latter type of capital-service partnership, but it clearly resembles the *commenda*.

In regard to the second requirement, it might be noted that Lessius was more specific than other authors in emphasizing the role of the intention (*animus*) with which the acquisition was made. Moreover, the idea that acquisitions over the course of the partnership and in the name of the partnership immediately accrued to all the partners in accordance with their shares was relatively novel. The late medieval jurists held that every single partner immediately acquired partial dominion over the things contributed by the other partners, provided that those goods were invested at the moment of concluding the partnership contract. The medieval jurists did not think along the same lines concerning money or goods that were

³¹ On this distinction, see W. Decock, *Donations, bonnes mœurs et droit naturel, Un débat théologico-politique dans la scolastique des temps modernes*, in: M. Chamocco Cantudo (ed.), *Droit et mœurs, Implication et influence des mœurs dans la configuration du droit*, Jaén 2011, p. 182-197.

³² Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 1, num. 2, p. 334.

³³ Ludovicus Molina, *De iustitia et iure*, Moguntiae 1614, tom. 2, tract. 2, disp. 420, cols. 766-768.

³⁴ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 1, num. 3, p. 334

acquired by one of the partners *after* the contract had come into existence. In this respect, Antonio Gómez claimed that Spanish law had ‘corrected’ the *ius commune*, since it stipulated that partners also acquired partial dominion over contributions made over the course of the partnership contract³⁵. Lessius cites Diego de Covarruvias y Leyva (1512-1577), the most important sixteenth century canonist from Salamanca, to buttress this relatively novel idea³⁶.

The third and fourth requirement that partnerships have to comply with are undoubtedly the best known principles in the history of company law. For centuries they have been considered as constituting the ‘nature’ (*natura*) of the partnership contract: first, the principle that profits and loss are shared by the partners (*lucrum et damnum sit commune*); second, that the profits are divided in accordance with the proportion of a partner’s contribution to the total stakes (*fiat divisio lucri secundum proportionem sortis a singulis collatae*). Yet, importantly, Lessius adds a major qualification to these principles. In his view, they are merely default rules. Consequently, the profit-loss-sharing-principle and the proportional division of the profits do not apply if partners expressly agree to have profits and losses distributed in a different way³⁷. Partners are free to adapt the third and fourth requirement to their own needs and desires, according to Lessius, on condition that the obligation (*onus*) which exceeds the nature of the partnership contract is duly compensated. Whether particular partnership contracts meet this condition or not, is the subject of Lessius’ first major dubitation within his chapter on *societas*.

3. Allocation of Profits in Capital-Service Partnerships

The concern about the just division of the profits in partnerships might seem to be exclusively moral in nature – a preoccupation for philosophers and theologians. In fact, the debate can be traced back at least to Justinian’s Digest and has hunted jurists for centuries up to

³⁵ Gomezius, *Commentariorum variarumque resolutionum iuris civilis, communis et regii* tomi tres, tom. 2, cap. 5, num. 3, f. 208v: ‘Item quaero, an inter socios ex solo titulo vel contractu transeat ipso iure dominium et possessio pro suis partibus sine traditione? Et breviter dico, quod in bonis praesentibus iam quae sitis bene transit, sed in futuris postea quarendis non, tex. est in l. 1, vers. si cum l. seq. ff. pro socio et ibi glossa ordinaria, Bart., Alb. et comm. docto. (...). Cuius ratio est, quia quilibet socius videtur habere et tenere bona sua nomine proprio et alterius socii, tanquam per clausulam constituti secundum doct. ibi. Sed certe ista eadem ratio, etiam videbatur militare in bonis futuris, et sic hodi habemus singu. l. par. qua hoc corrigit et expresse vult, quod imo ex hac ratione dominium et possessio transeat ipso iure pro sua parte in socium, etiam in bonis futuris postea quae sitis. Ita disponit lex 47, tit. 28, 3. par.’

³⁶ Diego de Covarruvias y Leyva, *Variarum resolutionum ex iure pontificio, regio et caesareo libri tres*, Lugduni 1557, lib. 3, cap. 19, num. 1, p. 985: ‘(...) futura nomine societatis quae sita utriusque socio quo ad dominium et possessionem quaerantur; bona vero futura quae sita nomine proprio communicanda sint (...).’

³⁷ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 1, num. 3, p. 334: ‘Haec tamen tertia et quarta conditio intelligenda est, nisi aliter expresse fuerit conventum, et onus, quod praeter naturam huius contractus alteri parti imponitur, debite compensetur.’

this day³⁸. In paragraph *Aristo* of law *Si non fuerint* (D. 17,2,29,2), reference is made to a particularly inequitable type of partnership (*iniquissimum genus societatis*), the so-called ‘leonine partnership’ (*societas leonina*)³⁹. The ‘leonine’ partnership derived its name from a story recounted by the Greek poet Aesopos (ca. 620-560 BC) in which a lion took all the profits for himself after a hunting-party with a fox and a donkey⁴⁰. According to the Roman legal text, a leonine partnership is an invalid partnership in which one partner can only make profits, while the other party suffers the loss (*alter lucrum tantum, alter damnum sentiret*). The text goes on to specify that the partner who suffers the loss does not benefit from the profits at all (*alter nullum lucrum sed damnum sentiret*). In other words, there is one partner who takes all the profits without being exposed to the losses, while the other partner remains deprived from the profits and suffers all the losses.

Importantly, the gloss on the text about the leonine partnership explicated that profits and losses could not be separated from one another⁴¹: ‘The one who expects profits, shall also expect losses, and conversely.’ The gloss founded this statement on another passage from the Digest, namely rule of law *Secundum naturam* (D. 50,17,10). This maxim stipulated that ‘it is in accordance with nature that the one who will suffer the inconveniences of something shall also enjoy its benefits.’⁴² Accordingly, taking advantage of the benefits of something means suffering the disadvantages of the same thing, and conversely. Profit-making is only lawful if it involves risk. Conversely, being exposed to risk is a lawful ground to make profits. One might call this the ‘profit-and-loss sharing principle’. It appears to be a fundamental and almost universal principle of commerce. The profit-and-loss sharing principle was inherent in Justinian’s *Corpus iuris civilis*. It has formed the cornerstone of Western jurisprudence regarding business and finance for many centuries. Today, it is one of the basic tenets of Islamic banking and finance⁴³.

Against this background, the first serious problem that Lessius tackles is how to judge the allocation of profits and losses in partnerships. He acknowledges that this is a thorny issue, on which different experts have expressed different opinions that often left people more perplexed after consulting the doctors than before. In Lessius’ view, four types of partner-

³⁸ Cf. K.-M. Hingst, *Die societas leonina in der europäischen Privatrechtsgeschichte, Der Weg vom Typenzwang zur Vertragsfreiheit am Beispiel der Geschichte der Löwengesellschaft vom römischen Recht bis in die Gegenwart*, [Hamburger Rechtsstudien, 94], Berlin 2003.

³⁹ D. 17,2,29,2 in *Corporis Iustinianae Digestum vetus*, tom. 1, cols. 1691-1692: ‘Aristo refert, Cassium respondisse societatem talem coiri non posse, ut alter lucrum tantum, alter damnum sentiret. Et hanc societatem leoninam solitum appellare. Et nos consentimus, talem societatem nullam esse: ut alter lucrum sentiret, alter vero nullum lucrum, sed damnum sentiret. Iniquissimum enim genus societatis est, ex qua quis damnum, non etiam lucrum spectet.’

⁴⁰ See Denis Godefroy’s note on D. 17,2,29,2 in *Corporis Iustinianae Digestum vetus*, tom. 1, col. 1691, and Hingst, *Die societas leonina in der europäischen Privatrechtsgeschichte*, p. 42-48.

⁴¹ Glossa *Qui lucrum ad* D. 17,2,29,2 in *Corporis Iustinianae Digestum vetus*, tom. 1, col. 1692: ‘Qui lucrum expectat, expectet et damnum, ut in eod. tit., l. si igitur, in fine et de reg. iur. l. secundum naturam.’

⁴² D. 50,17,10 in *Corporis Iustinianae Digestum novum*, tom. 3, col. 1868: ‘Secundum naturam est commoda cuiusque rei eum sequi, quem sequentur incommoda.’

⁴³ E.g. http://www.islamic-banking.com/profit_and_lose_sharing.aspx (website last visited on 28.3.2012).

ships need to be distinguished if one wishes to address this question properly. The first one is not truly a partnership, but rather an employment contract in which the worker is granted a share in the profits as an alternative way of payment. Lessius notes that this is one of the merchants' favorite means to enhance incentives for their factors to work more diligently (*ut diligentiores sint, dant eis in mercedem partem lucri*)⁴⁴. The other partnerships involve a partner investing capital (*sors*), and another partner investing labor and industry (*operae*). For the sake of brevity, we will call this type of *societas* 'capital-service partnerships'.

There is only one partnership which Lessius considers to be almost tantamount to a leonine partnership. It is a capital-service partnership in which the working partner is a partner whose share in the profits is proportionate to the monetary value of his labor, but who is not entitled to receive a proportionate part of the capital upon the dissolution of the partnership⁴⁵. Lessius argues that such a contract is inequitable, because the condition of the partners is uneven (*dispar conditio sociorum*) – unless there is some kind of additional agreement that compensates for the disequilibrium between the partners. The unevenness stems from the fact that the working partner certainly loses his contribution, because the labor invested cannot be restituted once it has been performed, while, normally, the capitalist can recover his capital. Moreover, the working partner has almost no chance of making profits. For example, if the monetary value of his labor is worth 100, and the contribution of the capitalist is 1000, then he can only get back more than he invested in the partnership if the total profits exceed 1100, because his share is 1/11. If the profits are below 1100, he cannot even get back the monetary worth of the labor which he has invested. Therefore, Lessius concludes, this type of partnership is almost leonine (*talis societas est fere leonina*).

According to Lessius, the aforementioned partnership can easily be converted into an equitable partnership, provided that the working partner is allowed to take a share in the capital which is in accordance with the proportion of the pecuniary value of his labor to the total value of labor and capital⁴⁶. Under these circumstances, the working partner will share not only in the profits but also in the capital when the partnership is dissolved. For example, if the monetary value of the labor is 100, the capital invested 1000, and the profits are 221, then the working partner will receive 111 [= (1/11*1000) + (1/11*221)] at the end of the partnership. Lessius argues that this contract is just, since the loss of the labor is borne

⁴⁴ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 2, num. 7, p. 335.

⁴⁵ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 2, num. 8, p. 335: 'Ut is qui operas confert, admittatur ut verus socius et solum sit particeps lucri secundum aestimationem operarum, quasi tantum pecuniae in societatem contulisset, quanti valent operaे; ut si conferas 1000 aureos, et opera socii aestimetur 100 aureis, sitque particeps lucri quasi contulisset solum 100 aureos. Hic contractus, etsi a quibusdam doctoribus probari videatur, est tamen omnino iniquus.'

⁴⁶ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 2, num. 8, p. 335: 'Ut is qui operas confert, non solum sit particeps lucri, sed etiam sortis, secundum aestimationem operarum; ita ut negotis peractis, ex tota summa, quae ex lucro et sorte conflata erit, tantum extrahat, quantum si loco operarum pecuniam aequivalentem contulisset.'

not only by the working partner but also by the capitalist⁴⁷. Of course, the reverse side of this arrangement is that the working partner must share in the loss of the capital. Otherwise, the equilibrium between the partners goes again lost. Consequently, if the capital is lost before the working partner has finished his labor, then the capitalist is entitled to a proportionate share in the monetary value of the remaining labor of the working partner⁴⁸.

The fourth type of capital-service partnership which is discussed by Lessius gives rise to the most challenging discussion. It gives readers a taste of Lessius' extraordinary prowess in the economic analysis of business and of how he thought that this insight into the economic logic behind commercial practice should be translated into legal categories⁴⁹. The partnership under scrutiny is one in which the working partner does not participate in the capital but only in the profits. Lessius claims that under certain conditions, which are different from the second and third partnership discussed above, this type of *societas* can be just. Particularly, Lessius indicates that the benchmark for assessing the equilibrium between the partners should be a comparison of the risks that both partners run⁵⁰. In this manner, he rejects the method of comparing the position of the partners in the second and the third partnership, that is either by calculating the proportion between the labor and the capital, or by calculating the proportion between the labor and the total sum of the investments. This is a relatively new approach, for which precedents can be found mainly in the work of the Spanish theologian Pedro de Navarra. Presumably, though, Lessius just takes seriously what is implicit in the Roman maxim that the benefits follow the inconveniences (D. 50,17,10), namely that the starting point for judging partners' share in the profits must be the risks to which they are exposed in pursuing those profits.

Consequently, risks should be compared to assess the just division of the profits. In Lessius' view, the risk run by the working partner is merely to lose the estimation of his labor (*aestimatio operae*), i.e. his wage. The capitalist, on the other hand, is exposed to two losses: first,

⁴⁷ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 2, num. 9, p. 335: 'Hic contractus est iustus. Probatur, quia qui confert operas, non minus debet esse particeps tum lucri tum sortis quam qui ponit tantumdem pecuniae. Non enim ipsi soli opera perire debet, cum non minus conferat ad negotiationem, quam is qui contulit tantumdem pecuniae.'

⁴⁸ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 2, num. 11, p. 335: 'Notandum est, quando hoc modo inita est societas, si sors pereat ante praestitam totam operam, socium, qui eam conferre debebat, teneri solvere alteri (cuius sors perit) partem aestimationis operarum, quae conferendae restabant. Sicut enim salva sorte et operâ exhibitâ, debetur socio conferenti operam certa pars sortis, ut dictum est, ita pereunte sorte et operâ salvâ (id est, nondum exhibitâ) debetur socio qui sortem posuit pars aestimationis operae restantis, iuxta modum praedictum.'

⁴⁹ Lessius' contribution to economic thought has been the subject of many interesting studies; see, for instance, B. Schefold (ed.), *Leonardus Lessius' De iustitia et iure, Vademeum zu einem Klassiker der Spätscholastischen Wirtschaftsanalyse*, Düsseldorf 1999, including references to further literature.

⁵⁰ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 2, num. 12, p. 335-336: 'Quarto fieri potest pactum, ut is qui operam confert non sit particeps sortis sed tantum lucri, ita ut, si peracta negotiatione nihil supersit praeter sortem, nihil habeat. Hoc potest esse iustum. Verum tunc non est comparanda pecuniae quantitas quam alter confert, cum pretio operarum, ut in secundo modo; neque est conflanda una sors ex illa pecunia et pretio operarum, ut in tertio; sed consideranda sunt ea quae utriusque pereunt et haec inter se comparanda.'

the estimation of the risk which his capital runs (*aestimatio periculi*), i.e. the price to insure his capital; second, the estimation of the profits that he is hoping to make by virtue of his money (*aestimatio lucri illâ pecuniâ sperati*), i.e. the price at which he could sell his hope of making profits (*spes lucri*) on the basis of that amount of money after deduction of labor and expenses⁵¹. The latter idea was controversial in the Aristotelian-scholastic tradition of conceptualizing money and profit-making, since money was thought to be sterile. For example, Domingo de Soto stated that the only risk that counted was the risk of losing the capital, but not the opportunity cost of parting with the money, since money was sterile⁵². However, Lessius argued that money became fruitful in the hands of the industrious (*etsi pecunia per se sit sterilis, tamen ut subest industriae alicuius fit foecunda*)⁵³.

Lessius defended his view about the fertility of money on numerous occasions⁵⁴. In this particular context, he sought explicit authoritative support for his thesis in Pedro de Navarra's rebuttal of Soto⁵⁵. Navarra often inspired Lessius in the most novel and controversial aspects of his ideas, for instance also in regard to the toleration of lying and simulation in speculative commercial activities⁵⁶. Yet, more importantly, the result of Lessius' risk assessment is that the sum of all these risks should be calculated on the basis of their estimation in the market. Subsequently, the proportion of each partner's risk to the total estimation of the combined risks should be calculated. This proportion will then determine the lawful and equitable share of each partner in the total profits⁵⁷.

Typical of his anxiety to express his thoughts both briefly and clearly, Lessius produces a concrete example of how this comparative risk analysis should be undertaken⁵⁸. Assume that a capitalist contributed 1000, of which the risk is estimated 100 and the opportunity cost 200; the risk of the working partner is estimated 100; the profits at the end of the partnership are 800. The legitimate share of each partner can be calculated by adding up all the risks [=400] and by determining the share of each partner in the total risks. The share of the capitalist is $\frac{3}{4} [(100+200)/400]$ and that of the working partner $\frac{1}{4} [100/400]$. Applied to the total amount

⁵¹ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 2, num. 13-15, p. 336.

⁵² Soto, *De iustitia et iure*, Salmanticae 1562, lib. 6, q. 6, a. 2.

⁵³ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 2, num. 14, p. 336; cf. T. Van Houdt, *Leonardus Lessius over lening, intrest en woeker, De iustitia et iure, lib.2, cap.20, Editie, vertaling en commentaar*, [Verhandelingen van de Koninklijke Academie voor Wetenschappen, Letteren en Schone Kunsten van België, Klasse der Letteren, Jaargang 60, Nr. 162], Brussel 1998, p. 231-250.

⁵⁴ W. Decock, *L'usure face au marché, Lessius (1554-1623) et l'escompte des lettres obligataires*, in: A. Girollet (ed.), *Le droit, les affaires et l'argent, Célébration du bicentenaire du code de commerce*, Dijon 2008, p. 221-238.

⁵⁵ E.g. Pedro de Navarra, *De restitutione in foro conscientiae*, Toleti 1597, tom. 2, lib. 3, cap. 2, num. 364, p. 446: 'Licet enim pecunia ex se non fructificet, in negotiacione tamen fructificat.'

⁵⁶ W. Decock, *Lessius and the breakdown of the scholastic paradigm*, *Journal of the History of Economic Thought*, 31 (2009), p. 57-78.

⁵⁷ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 2, num. 20, p. 336: 'Iuxta quartum modum, aestimandum est periculum sortis et spes lucri per talem sortem obtinendi, deductis operis et expensis. Deinde aestimandae sunt operae singulorum et hac aestimatione iuncta cum pretio periculi sortis et lucri sperati duae summae utrimque conflandae et iuxta harum proportionem facienda est divisio lucri.'

⁵⁸ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 2, num. 15, p. 336.

of profits, these factors will now give the share of each partner in the profits, i.e. 200 for the working partner and 600 for the fund provider.

4. *Investment with Capital Guarantee and Fixed Return Rate (Contractus Trinus)*

Lessius also applied the method of comparative risk analysis to judge the lawfulness of the so-called 'trine' or 'triple' contract (*contractus trinus/triplex*). This particular contract derives its name from the fact that, upon closer examination, it consists of a combination of three contracts: a partnership contract (*societas*), an insurance contract (*assecuratio*), and a purchase contract (*emptio spei*)⁵⁹. In addition to the usual partnership contract, the working partners stipulate that they guarantee the capital and that they will return a small but fixed amount of profits to the capital investors every year in exchange for keeping the remainder of the future and incertain gains for themselves (*pactum cum sociis ut salvam praestent sortem et redditum quotannis certum lucrum parvum pro incerto magno*)⁶⁰. In other words, the *contractus trinus* allows providers of funds to invest their money with a capital guarantee and a fixed return rate. Conversely, working partners, particularly merchants, can raise liquidity in a way that is technically different from a simple money loan and with the prospect of making almost unlimited profits.

The contracts that make up a *contractus trinus* could be concluded between four different parties or between the capitalist and the entrepreneur alone. In the first case, investor A concluded a *societas* with entrepreneur B, then insured his capital with C and eventually sold his hope of making profits to D. For example, investor A contributes 100 guilders to a partnership with merchant B. He insures his capital at a 5 guilder annual premium with insurer C. Finally, he sells his hope of making profits in the future at a fixed annual price of 10 guilders. The upshot of this transaction is that the investor benefits from a capital guarantee for the full 100 guilders which he contributed to the partnerships and, on top of that, from a net annual return on investment of 5 guilders⁶¹. In the second case, investor A concludes the partnership contract, the insurance contract and the sale contract with entrepreneur B. The result of this transaction for A remains unchanged: he takes a capital guarantee worth 100 guilders and a net annual return of 5 guilders. B gets a 100 guilder fund to undertake his enterprise. He receives 5 guilders on an annual basis to insure A's capital, which exposes him to a potential loss of 100 guilders. Finally, the entrepreneur buys the investor's hope of making profits at 10 guilders a year, thus obtaining the prospect of making almost unlimited profits.

The result of the threefold contract was not very different from a money deposit or a loan for consumption. Typically, the *contractus trinus* was considered to be an implicit form of money loan (*mutuum implicitum*). In fact, in commercial life the partners did not mention

⁵⁹ Zypaeus, *Notitia iuris belgici*, lib. 4, tit. *De usuris et nautico foenore*, p. 107-108.

⁶⁰ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, tit., p. 337.

⁶¹ See Löber, *Das Spanische Gesellschaftsrecht im 16. Jahrhundert*, Freiburg im Breisgau 1965, p. 39.

the existence of three separate contracts. Instead, most of the time they simply employed the formula of ‘consigning money’, without formally mentioning the partnership, the insurance or the *emptio spei*⁶². The so-called ‘5 per cent contract’ or ‘German contract’ often resolved in a triple contract⁶³. The three contracts only existed virtually. In practice, the *contractus trinus* was a single contract with a triple effect which made it almost tantamount to a simple money-deposit or money-loan at interest. This was recognized by the theologians. Conrad Summenhart (c. 1455-1502), for instance, said that a guaranteed partnership resembled a loan as to its form. On that account, he dismissed the triple contract as unlawful⁶⁴. However, other theologians tried to save the practice of money-deposit and money-loan at interest by arguing that, theoretically, these practices amounted to safe partnership contracts, notably to a *contractus trinus*.

From a technical point of view, at least one fundamental distinction needs to be made between *mutuum* and *societas* which made safe partnership investments less problematical than money-loans at interest. In a loan for consumption, the ownership of the money is transferred to the borrower, but in a partnership, the capitalist retains the ownership of the money. In the eyes of the scholastics, this distinction was decisive, because ownership was a legitimate title for making profits, whereas making profits (e.g. charging interests) on the basis of something that no longer belonged to you (e.g. money lent) was not. This reasoning stems from the above-mentioned ‘profit-loss-sharing-principle’: the profits that a partner derives from investing his capital are legitimate, because the capitalist remains the owner of the capital, hence exposing himself also to the risk of losing his investment if the project fails. Conversely, a money-lender is not allowed to charge interest, since the borrower has been granted the ownership over the money on condition that he returns the same kind of goods after a certain amount of time.

In traditional scholastic thought – as in present day Islamic finance – ownership, risk and lawful profit-making are intricately intertwined⁶⁵. Since the partnership was seen as a risk-sharing investment, the late medieval theologians and jurists generally did not bother about the investor making profits by virtue of the money invested in a partnership. A typical illustration of this can be found in Thomas Aquinas’ classical analysis of the difference between the unlawfulness of charging interest in a money-loan and the lawfulness of commercial profits made by virtue of a partnership⁶⁶. A money-lender transfers ownership (*dominium*) over the money to the borrower. Hence, the risk (*periculum*) is shifted from the money-lender

⁶² Noonan, *Scholastic analysis of usury*, p. 270.

⁶³ Noonan, *Scholastic analysis of usury*, p. 212, n. 28. Compare Van Roey, *Le contractus germanicus*, p. 901-946.

⁶⁴ I. Birocchi, *Tra elaborazioni nuove e dottrine tradizionali, Il contratto trino e la natura contractus*, Quaderni fiorentini per la storia del pensiero giuridico moderno, 19 (1990), p. 249-273.

⁶⁵ Van Houdt, *Leonardus Lessius over lening, interest en woeker*, p. 242-243.

⁶⁶ Thomas Aquinas, *Summa Theologiae*, IIaIIae, quaest. 78, ad 5 [taken from the online version of the Leonine edition, available on www.corpusthomisticum.org].: ‘Ad quintum dicentum quod ille qui mutuat pecuniam transfert dominium pecuniae in eum cui mutuat. Unde ille cui pecunia mutuatur sub suo periculo tenet eam, et tenetur integre restituere. Unde non debet amplius exigere ille qui mutuavit. Sed ille qui committit pecuniam suam vel mercatori vel artifice per modum societatis cuiusdam, non transfert

onto the borrower. The borrower has to make restitution of the money to the lender at the end of the loan regardless of what happened to the money in the meantime. The commercial investor, on the other hand, does not convey the ownership (*dominium*) over the money to the working partner. Hence, neither is the risk (*periculum*) passed on to the working partner. If the capital is lost during the partnership, then this is the investor's bad luck. Conversely, if profits are made, then the investor has a legitimate stake in them on account of his risk-taking.

Against this background, the trouble with a partnership in which the investment is safe and the profit certain becomes apparent. Sharing in the profits of a triple contract goes against the traditional logic, which sees a continuity between ownership, risk and profit-making. The incidence of risk as an essential element in the legitimization of the investor's profits does not apply anymore to the triple contract, since the working partner insures the capitalist against the risk of losing the principal. In other words, the legitimization of the triple contract could not occur until the idea had gained ground that ownership and risk could be separated, for instance through an insurance contract. This happened in the fifteenth and sixteenth centuries⁶⁷. A similar presupposition is that buying the hope (*spes*) or chance (*alea*) of making profits is morally and legally possible. Contrary to the *emptio rei speratae*, the *emptio spei* is completed even if the future event does not take place, so that risk is immediately shifted on to the buyer⁶⁸. Applied to the triple contract, by selling his right to future profits, the capitalist liberates himself from the risk that the partnership might not produce any gains at all.

A comprehensive overview of the history of theologians attempting to assess the triple contract falls outside the scope of this paper. Relying on major existing publications⁶⁹, the following paragraphs merely intend to give an insight into some of the major steps in the moral analysis of this legal device in the late fifteenth and early sixteenth century. It appears that, from the beginning, theologians were anxious to defend the triple contract as a way to legitimize the practice of 'wards and widows' (*pupilli et viduae*) depositing their money with merchants in exchange for a fixed annual return⁷⁰. For example, Luís de Molina started his

dominium pecuniae suae in illum, sed remanet eius, ita quod cum periculo ipsius mercator de ea negotiatur vel artifex operatur. Et ideo licite potest partem lucri inde provenientis expetere, tanquam de re sua.'

⁶⁷ For further analysis, see G. Ceccarelli, *Risky business. Theological and canonical thought on insurance from the thirteenth to the seventeenth century*, *Journal of Medieval and Early Modern Studies*, 31 (2001), p. 607-658; G. Ceccarelli, *Il gioco e il peccato. Economia e rischio nel tardo Medioevo*, [Collana di storia dell'economia e del credito promossa dalla fondazione del monte di Bologna e Ravenna, 12], Bologna 2003.

⁶⁸ R. Zimmermann, *The law of obligations. Roman foundations of the civilian tradition*, Oxford 1996, p. 245-249.

⁶⁹ E.g. Noonan, *Scholastic analysis of usury*, p. 202-229; A. García Ulecia, *El contrato trino en Castilla bajo el derecho comun*, Historia, Instituciones, Documentos, 6 (1979), p. 129-185; I. Birocchi, *Tra elaborazioni nuove e dottrine tradizionali. Il contratto trino e la natura contractus*, Quaderni fiorentini per la storia del pensiero giuridico moderno, 19 (1990), p. 243-322.

⁷⁰ Wards and widows belonged to the classical category of *personae miserabiles* who needed special protection from the Church; cf. Th. Duve, Th., *Sonderrecht in der Frühen Neuzeit. Studien zum ius singulare und den privilegia miserabilium personarum, senum und indorum in Alter und Neuer Welt*, [Studien zur europäischen Rechtsgeschichte, 231], Frankfurt am Main 2008.

discussion by drawing readers' attention to the widows in Lisbon⁷¹. Apparently, these widows used to deposit their savings with merchants who promised them to return the principal and give them a fixed annual return. It suffices to recall that the legal status of public entities and the Church itself was often put on a par with that of 'wards and widows' to understand that the stakes in this debate were high⁷². Indeed, the investing partners most of the time were persons without business experience, such as widows and orphans, priests and nuns, public officials and notaries⁷³.

As mentioned before, a crucial idea behind the toleration of triple contracts was that the risk of capital in a partnership can be transferred to the working partner at a just price⁷⁴. This turn can be seen, for instance, in the work of Angelo Carletti de Chivasso (ca. 1414-1495), the vicar-general of the Franciscans of the Observance. He is famous for his influential manual for confessors, the *Summa angelica*, which was burned by Martin Luther in Wittenberg on 10 December 1520 because it typically solved moral problems by means of Roman law and Aristotelian philosophy rather than the Bible. At the beginning of his exposition, Angelo Carletti de Chivasso seemed to condemn the practice of safe capital investments in partnerships. Yet, eventually, he envisaged the possibility that the capitalist may conclude an insurance contract with a third party⁷⁵. Alternatively, the working partner himself could decide to offer this insurance to the capitalist at a price⁷⁶. Angelo thought that this construction was not usurious, as long as the working partner voluntarily agreed (*libere conveniret*) to insure the capitalist against the risk of losing the principal and the capitalist forewent part of the profits in exchange for this service.

⁷¹ Molina, *De iustitia et iure*, tom. 2, tract. 2, disp. 417, col. 457: 'Frequenter Olyssipone atque aliis in locis solent viduae et plerique alii tradere pecunias artificibus et aliis negotiatoribus ad utilem aliquam negotiationem cum pacto, ut integrum ipsis sit discedere a societate, quando ipsis placuerit, aut finito aliquo certo tempore, et cum pacto, ut capitale, aut pars capitalis quam apponunt, integra et salva ipsis semper maneat, periculumque totum in se suscipiat negotiator, et insuper cum pacto, ut ex lucro quotannis vel certum quid ipsis reddatur, puta ad rationem quatuor, quinque aut sex pro centum, sive negotiator multum sive parum aut nihil lucretur (...).'

⁷² E. Conte, *I beni delle 'piae cause' tra beneficenza e vincolo fiduciario*, in: O. Condorelli – F. Roumy – M. Schmoekel (eds.), *Der Einfluß der Kanonistik auf die europäische Rechtskultur*, Band 2: *Öffentliches Recht*, [Norm und Strukter, 37, 2], Köln – Weimar – Wien 2011, p. 295-310, p. 307, n. 35.

⁷³ R. de Roover, *The organisation of trade*, in: M.M. Postan – E.E. Rich – E. Miller (eds.), *Cambridge Economic History of Europe*, Cambridge 1963, vol. 3, p. 54; also cited in H.J. Berman, *Law and revolution, The formation of the Western legal tradition*, Cambridge Mass. 1983, p. 353.

⁷⁴ Noonan, *Scholastic analysis of usury*, p. 205.

⁷⁵ Angelo Carletti di Chivasso, *Summa angelica de casibus conscientiae*, s.v. *societas*, Stratioburgi 1520 [1st edition 1486], f. 218r, num. 7: 'Adverte tamen quod si quis nollet periculo capituli se exponere et inveniret aliquem qui eum vellet assecurare pro aliquo sibi dato non esset usura se liberare a periculo per talem assecurationem, licet pro lucro accipiat de capitali sic assecurato; quod quidem lucrum parit negotiatio talis capitalis dati in societatem.'

⁷⁶ Angelo Carletti di Chivasso, s.v. *societas*, f. 218r, num. 7: 'Et idem dicerem quando socius accipiens ipsum capitale conveniret libere cum socio dante capitale de dando sibi tale modicum de lucro, quod verisimiliter quilibet aliis sic faceret si dans capitale remitteret totum lucrum aliud quod deberet habere ex tali societate, et quod eum assecuret pro principali. Immo si nihil esset lucri solveret nihilominus assecurationem.'

Guaranteed partnerships become almost indistinguishable from loans at interest. This explains why the triple contract raised both suspicion and interest among the doctors. Theologians started to approve of the triple contract, to 'save' certain 'usurious' practices by saying that the legal construction behind those practices was different from a simple money-loan or deposit. For example, widows and wards depositing their money with merchants in exchange for a fixed annual return were said to have had the *intention* only to conclude a triple contract, even though the apparent nature of their transaction was a money-loan at interest. Reality could be interpreted in various ways, since a loan at an interest rate of 5 per cent was virtually indistinguishable from a guaranteed partnership at 5 per cent. Theologians suggested that the intention of the parties should be used as the main criterion for interpreting contractual reality. In this manner, they could argue that people depositing their money with merchants in exchange for a fixed annual profit and capital guarantee did not commit usury, provided that their (*intentio*) had been to conclude a partnership contract and not a money-loan. In other words, the doctrines of the triple contract and implicit intention were successfully used as means to undermine the usury prohibition⁷⁷.

The debate on the triple contract reached a peak at the outset of the sixteenth century, certainly in the German areas. As frequently occurred, Conrad Summenhart's exposition in his *Septipertitum opus de contractibus* stood out through its deepness, detail, and diplomatic qualities. He put forward new ideas, while retreating behind the safe old common opinion⁷⁸. Inviting his readership to look at the rational grounds behind the laws, Summenhart first tried to argue that the triple contract was not usurious. He conceded that the capital guarantee seemed to be at odds with an essential feature of the partnership contract (*natura contractus*), namely the brotherly division of profits and losses among all the partners. However, Summenhart proposed a new way of looking at the nature of the partnership contract. The theologian from Tübingen argued that the 'natural' elements of the partnership contract were merely default rules. They were potentially present in all partnership, but by virtue of voluntary consent the parties could decide not to activate those natural elements⁷⁹. Hence, the fact that the investor is safe on account of the insurance agreement does not necessarily mean that the partnership contract is invalid. Risk can be transferred to the working partner without violating the principle justice in exchange, on condition that that the investor compensates him for this additional obligation. This is an idea that was later adopted by Lessius.

Traditionally, the incidence of risk was considered to be an essential element to legitimize the capitalist's profits in a partnership by contrast with the usurious nature of interests claimed by a money-lender. Summenhart maintained, though, that this is merely an optional

⁷⁷ Noonan, *Scholastic analysis of usury*, p. 269-273. On the doctrine of implicit intention and the role it played in undermining the usury doctrine, see T. Van Houdt, *Implicit intention and the conceptual shift from interesse to interest, An underestimated chapter from the history of scholastic economic thought*, Lias, Sources and documents relating to the early modern history of ideas, 33 (2006), p. 37-58.

⁷⁸ The following synthesis is indebted to Birocchi, *Tra elaborazioni nuove e dottrine tradizionali, Il contratto trino e la natura contractus*, p. 253-273.

⁷⁹ Birocchi, *Tra elaborazioni nuove e dottrine tradizionali, Il contratto trino e la natura contractus*, p. 265-266.

element that is potentially inherent in a partnership contract. Everything, also the nature of the contract, depends on the will of the parties. In addition, the interpretation of contract is dependent on the intention of the parties. Consequently, if parties have had the intention of concluding a triple contract, then an agreement between an investor and merchant in which the principal is guaranteed and the investor receives an annual return of 5 per cent should be interpreted as a triple contract and not as a money-deposit or a money-loan at interest. The inner intention of the parties determines the outward reality. Clearly, this reasoning completely undermines the usury doctrine. That explains why Summenhart, who was always careful not to offend traditional thinkers, eventually warned that the triple contract should not be allowed⁸⁰. More precisely, he argued that since the inner intention cannot be known by other market participants, the triple contract is likely to give rise to suspicion of usurious loans and, hence, cause scandal (*scandalum*) – which is sinful in its own right⁸¹.

The new analysis of the triple contract as put forward by Summenhart was adopted unreservedly by the famous German theologian Johannes Eck (1486-1543)⁸². He did no longer think that the argument of scandal should prevail over the inner will and intention of the parties. Eck defended the triple contract in 1515 in Bologna during a meeting convened by the Fugger banking family. Eck had been brought into contact with the Fugger family through his friend Conrad Peutinger (1465-1547) from Augsburg. He advocated the triple contract on the grounds that the ‘profit-loss-sharing-principle’ (*utrumque debere ponit sub fortuna*) was not an essential element of partnership contracts. Eck admitted that the aleatoric element was natural to partnership contract, but he affirmed that natural elements of a contract which were not essential could be changed by virtue of voluntary consent between the parties. According to Eck, the only essential feature of a partnership is that parties agree to contribute something for the sake of a common goal. The natural elements of a contract, such as the exposure of all parties to both profits and losses, can be altered by agreement (*fateor naturalia posse pacto mutari*)⁸³. Hence, it is possible for parties to reach an agreement about a safe partnership with a fixed gain for the capitalist.

Eck argued that the interpretation of the contract must be entirely determined by the intention of the parties⁸⁴. The will of the parties, which aims at promoting their interests (*pro commoditate utriusque*), should be respected as much as possible. Consequently, if only the parties have the right intention (namely to conclude a triple contract and not a usurious loan), then they are not violating the usury prohibition. According to Eck, usury should not be presumed and nothing is forbidden unless it is expressly forbidden by law. Since the triple contract is not expressly forbidden by law and the parties have the intention of concluding

⁸⁰ Birocchi, *Tra elaborazioni nuove e dottrine tradizionali, Il contratto trino e la natura contractus*, p. 271-273.

⁸¹ On the historical role of *scandalum* in canon law, see A. Fossier, *Propter vitandum scandalum, Histoire d'une catégorie juridique (XI^e-XV^e siècles)*, Mélanges de l'École Française de Rome, Moyen Âge, 121/2, Rome 2010, p. 317-348.

⁸² Birocchi, *Tra elaborazioni nuove e dottrine tradizionali, Il contratto trino e la natura contractus*, p. 280-304.

⁸³ Birocchi, *Tra elaborazioni nuove e dottrine tradizionali, Il contratto trino e la natura contractus*, p. 293.

⁸⁴ Birocchi, *Tra elaborazioni nuove e dottrine tradizionali, Il contratto trino e la natura contractus*, p. 298.

a safe investment agreement, an insured partnership at 5 per cent cannot be dismissed as being usurious. Moreover, Eck rebuked the idea that such a contract was unjust because the interests of the merchant, the working partner, were prejudiced by the triple contract. He countered this argument by observing that, in fact, the working partner was happy to buy the future profits at 5 per cent, since he was driven by the hope to make much more profits than that.

Not surprisingly, Eck drew heavy criticism for his straightforward way of reasoning, mostly by the humanist jurists of this time. But he seems to have had a very clear aim in mind: to legitimize the commercial and financial practices in Augsburg and in other German cities of his day⁸⁵. A century later, Leonardus Lessius was obliged to repeat Eck's intellectual *tour de force* for roughly the same reasons: merchants and bankers in Antwerp, which had been a center for the innovation of commercial and financial techniques throughout the sixteenth century, felt an urgent need for legitimacy of their daily activities. For despite Eck's defence of the triple contract in 1515, doubts remained as to the lawfulness of this rather clever way of circumventing the usury prohibition. These doubts stemmed from secular and ecclesiastical legislation that sought to ban the triple contract from the market, as well as from the authority of Domingo de Soto (ca. 1494-1560), a major theologian from Salamanca who opposed the triple contract. As frequently occurred, Soto showed himself to be a rigorist in economic matters. He stuck to the traditional view which emphasized the interconnectedness of risk, ownership and profit-making⁸⁶. Hence, he could not distinguish between an insured partnership with fixed gains and a usurious money-loan.

5. General Justification of the *Contractus Trinus* on Rational Grounds

The thrust of Lessius' exposition on the *contractus trinus* was to defend it as a just means for providing guaranteed commercial credit with a fixed annual dividend. In many respects, Lessius' project was a late echo of Eck's endeavor to defend the triple contract. As moral theologians they were both highly sensitive to the needs of business practice and defended contractual freedom against unduly restrictive moral and legal obligations. Perhaps, Lessius was just a bit more prudent than Eck. Accordingly, at the outset of his dubitation on the *contractus trinus* Lessius produced a list of no less than fifteen canonists and theologians who had already defended the triple contract⁸⁷. He highlighted and interpreted some of the most relevant

⁸⁵ Birocchi, *Tra elaborazioni nuove e dottrine tradizionali. Il contratto trino e la natura contractus*, p. 303-304.

⁸⁶ García Ulecia, *El contrato trino*, p. 138-139, and Löber, *Das spanische Gesellschaftsrecht*, p. 43-44.

⁸⁷ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 23, p. 337: 'Verum contraria sententia est multo probabilior et verior, nimurum haec pacta in societatis contractu esse licita, sive simul fiant cum sociis, sive successive, modo prudentis arbitrio servetur aequalitas. Hanc expresse multi viri doctissimi et religiosissimi tenent, quorum verba breviter adducam, ut maiorem fidem faciant apud eos qui vel aliter sentiunt, vel rem non penetrant et magis auctorum numero quam rationum pondere moventur.'

passages in their work ‘for the sake of those who are convinced by the number of authorities more than by the weight of argument’. From this overview it appears that Lessius knew Eck’s work merely indirectly, mainly through the Scotsman John Mair’s (1467-1550) discussion of the subject. Lessius also recognized that the theologians had hitherto been more favorable of the *contractus trinus* than the jurists⁸⁸. Yet, what is really interesting about Lessius’ argumentation is that he invited his readers to leave aside the arguments from authority.

Besides the sheer length of his argumentation, Lessius’ dig at those scholars who relied more eagerly on authorities than on the voice of reason indicated what really mattered to him: the rational analysis and the defence on rational grounds of the triple contract. According to Lessius, assessing the inequity (*iniquitas*) of a safe investment with a guaranteed annual income requires a thorough analysis of three possible sources of inequity in that kind of contracts⁸⁹: 1) an uneven or unequal relationship between the contributions of the partners (*non servetur aequalitas inter ea quae commutantur*); 2) a violation of the nature of the contract because the working partner is overburdened (*mercator obligetur ad aliquid supra naturam contractus*); 3) the transformation of the triple contract into an implicit money-loan on account of the merchant’s obligation to insure the capital, so that the fixed annual profit is tantamount to usury (*ratione assecurationis praestandae a mercatore fit implicitum mutuum ex quo non licet lucrum captare*). The upshot of Lessius’ argumentation will be that the triple contract cannot be declared inequitable on either of those grounds.

As far as the first possible source of inequity is concerned, Lessius argues that there is no inequality between the partners’ respective contributions to what can be analyzed as a triple contract. Interestingly, in this context he expressly uses the terms ‘depositor’ (*deponens sortem*) and ‘merchant’ (*mercator*) to denote the investor and the working partner, respectively. This is a good indication that the triple contract was actually a merely virtual construction to come to grips with the reality of guaranteed commercial credit with fixed reward. In essence, Lessius repeats exactly the same comparative risk/cost analysis which he already applied to the question of the just division of the profits in capital-service partnerships. In his view, both the depositor and the merchant expose themselves to three risks, obligations or costs. He claims that prudent men will say that the total estimation of those costs comes down to the same amount for both parties.

Let us start by looking at the costs suffered by the investor. First of all, he exposes his capital to a risk. This might seem to be a false cost, since capital guarantee is one of the essential features of a *contractus trinus*, but Lessius points out, quite realistically, that the insurance promised by the merchant is very unreliable (*securitas valde infida*), frequently resulting in the investor’s bankruptcy⁹⁰. Investors are very happy to pay a higher premium for effective insurance that is further strengthened by a real security such as a pawn or a mortgage. The

⁸⁸ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 23, p. 337: ‘Etsi iuristae forum externum spectantes et praesumptioni innixi contrarium tenerent.’

⁸⁹ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 25, p. 338-339.

⁹⁰ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 25, p. 339: ‘Primum est aestimatio periculi cui pecuniam suam exponit. Etsi enim mercator dicatur eam assecurare, haec tamen securitas est valde infida, et

second contribution made by the investor is that he deprives himself of the advantages and ease (*commoditas*) offered by liquid money – advantages which stem from the fact that liquidity allows one to avail himself of opportunities that suddenly present themselves⁹¹. The price of liquidity preference is to be seen as a cost which the investor suffers by parting with his money. Similarly, the estimation of the future profits that can be made with present money can be considered a partial cost for the investor. According to Lessius, daily experience and merchants' confessions (*quotidiana experientia et mercatorum confessio*) show that the profits that an industrious merchant can make with liquid money easily attain 10 or 12 per cent⁹². This is, literally, an opportunity cost incurred by the investor.

From the perspective of the merchant, concluding a triple contract also entails three costs. First of all, the merchant puts his work and industry in the service of the partnership. He spends his labor to spend the money of the capital investors in a fruitful way. According to Lessius, this cost should not be overestimated, since the merchant would invest his labor anyway to bring his private money to fruition. Rather, Lessius sharply notes, the merchant benefits from the fact that investors have deposited their capital with him. This is a clever observation that can also be found in Molina⁹³. To the merchant, managing more money and displaying more riches mean that he enjoys more trust and improves his reputation (*auget illorum fidem et facit illustriores*)⁹⁴. Also, he can buy at more advantageous prices, since he is able to buy larger quantities and make cash payments. In conclusion, Lessius would almost be inclined to maintain that the labor cost is actually more of a benefit than a cost. He also minimizes the second cost incurred by the merchant, namely the cost of insuring the capital. Insurance is merely a personal security, not a real security, so it entirely depends on the trustworthiness of the merchant (*nitens sola fide mercatoris*)⁹⁵. Moreover, if the merchant goes bankrupt, then the insurance is of no avail to the investor. Conversely, if the merchant does

cum ea plurimi evertuntur. Unde plerique libenter adhuc darent unum in centum pro perfecta assecuratione, per pignus aut hypothecam sufficientem obtinenda.'

⁹¹ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 25, p. 339: 'Secundum, aestimatio commoditatis, quam habebat ex pecunia praesenti. Commodum enim cuique est habere pecuniam suam expeditam ad omne lucrum, quod se forte offeret.'

⁹² Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 25, p. 339: 'Tertium est aestimatio lucri sperati, quae quando industrius est mercator, facile est 10. vel 12. in centum et saepe multo amplius, ut quotidiana experientia et mercatorum confessione constat.'

⁹³ Molina, *De iustitia et iure*, tom. 2, tract. 2, disp. 417, num. 1, col. 755.

⁹⁴ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 26, p. 339: 'Primum est elocatio operarum, seu obligatio ad impendendam illam pecuniam negotiationi. Haec non magni a mercatoribus pecuniam accipientibus aestimatur, quia eadem opera illam pecuniam una cum sua impendunt. Imo id auget illorum fidem, et facit illustriores, quod magnam vim pecuniae habeant. Unde fit ut meliori pretio emant, partim propter fidem seu creditum, partim quia merces in maxima quantitate numerata pecunia comparant. Quod facere absque adminiculo illo non possent.'

⁹⁵ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 26, p. 339: 'Secundum est assecuratio sortis. Haec etiam non magni penditur, tum quia ea securitas parum est secura et multis periculis exposita, utpote nulla nitens hypotheca, sed sola fide mercatoris (unde non est maior quam sit securitas bonorum ipsius mercatoris quae omnia fortunae sunt exposita), tum quia si mercator evertitur fortunis nihil iuvabit alterum, pactum illud assecurationis. Si non evertitur, libenter solvet sortem, ne apud alios amittat fidem.'

not go bankrupt, then he will be happy to fulfill his promise of guaranteeing the principal, for fear of losing his trustworthiness among other market participants (*ne amittat fidem*). In other words, Lessius suggests that performing his obligations is in the merchant's own interest, so that they can hardly be considered as costs. The merchant's third and last obligation, namely to pay a fixed annual dividend, e.g. 6,25 per cent, is also downplayed by Lessius, since it is a less onerous obligation than having to pay rents (*obligatio censuaria*)⁹⁶.

To sum up Lessius' discussion of the first potential source of unlawfulness of the triple contract, he denies that there is inequality between the obligations of the investor and the merchant, respectively. By minimizing the gravity of the merchant's obligations, he is convinced that his comparative cost analysis must lead prudent merchants to the conclusion that the triple contract does not suffer from inequality⁹⁷. More pragmatically, Lessius concludes that the following contractual formula (*forma/formula*) must be deemed entirely just⁹⁸: 'Peter consigns 100 florins to Paul, a merchant with the following aim: in exchange for getting part of the gains and guaranteeing the capital, Paul assigns five florins to Peter on an annual basis while keeping the rest of the profits for himself.' According to Lessius, the triple contract is an autonomous contract *sui generis*, of which the constituent parts are mutually dependent on each other⁹⁹. It can be analyzed as an innominate contract of the type *do et facio ut des et facias*, i.e. 'I leave you my money so that you can do business with it (meaning that I expose my money to risk and that I deprive myself of the ease and opportunities it procures), and I also grant you all the profits so that you can do business with them and oblige yourself to rendering the principal and and paying 6,25 per cent', or 'If you are prepared to do business with my money, insure the principal and oblige yourself to paying me 6,25 per cent, then I will give you my money and grant you the total profits.'

In dealing with the second potential source of inequity in triple contracts, namely a violation of the nature of the contract (*natura contractus*), Lessius adopts the same strategy as in the preceding argumentation: he minimizes the gravity of the working partner's obligations so as to make it easier to legitimize the capitalist's safe investment with fixed profit margin,

⁹⁶ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 26, p. 339: 'Tertium est obligatio solvendi 6. et 1/4 in centum vel quantum iudicio peritorum conventum fuerit. Quae obligatio minoris aestimatur quam censuaria propter infirmitatem fundamenti, nimurum quia caret hypotheca et quia omnia bona illius magis sunt exposita periculis quam eorum a quibus census emi solent.'

⁹⁷ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 26, p. 339: 'Conferantur nunc haec tria quae utrumque praestantur inter se. Cui dubium esse queat, quin iudicio et aestimatione peritorum mercatorum possit inter haec statui aequalitas?'

⁹⁸ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 22, p. 337 (jo. num. 26, in fine, p. 339): 'Petrus consignat centum florenos apud Paulum mercatorem, ut ei pro parte lucri, capitali salvo, assignet per annum quinque florenos, residuo lucri sibi reservato.'

⁹⁹ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 27, p. 339: 'Hinc patet, hos tres contractus posse fieri per modum unius contractus innominati, do et facio ut des et facias, nimurum, Trado tibi hanc meam pecuniam ad negotiandum (exponens eam periculo et privans me illius commoditate) et do tibi totum lucrum, ut tu ea negotieris et te obliges ad reddendam sortem et ad solvendum 6 1/4 in centum. Vel sic, Si velis mea pecunia negotiari, assecurare sortem et obligare te ad solvendum 6 1/4 in centum, tradam tibi meam pecuniam et concedam tibi totum lucrum. Hic non sunt tres contractus a se mutuo independentes, sed unus solus involvens omnia, quae utrimque sunt conferenda et commutanda.'

which was perceived to be relatively unburdensome. As has already been explained above, it belonged to the nature of the partnership contract that profits and losses were shared among the partners. Therefore, the prototype of an invalid partnership was the *societas leonina* – in which one party took all the profits without being exposed to any risk, or in which one party was excluded from the profits while remaining exposed to the losses. The ‘profit-loss-sharing-principle’ derived from the fraternal character of the *societas*, which is closely connected with its legal historical origins in the law of hereditary succession, e.g. *erctum non citum*. Also, theologians and jurists in the early modern period continued to see *societas* in the philosophical terms of Aristotle, Cicero and Thomas Aquinas, namely as the third form of friendship (*amicitia*), i.e. friendship for the sake of profit¹⁰⁰.

Against this background, it is no surprise to find that the ‘profit-loss-sharing-principle’ was traditionally thought to be a ‘natural’ element of partnership contracts. To quote a typical saying, here expressed by Baldus de Ubaldis (1327-1400), ‘a partnerships is like a brotherhood’ (*societas habet instar fraternitatis*)¹⁰¹. Consequently, the profits had to be distributed among all parties, preferably according to equal parts, unless the parties had reached an alternative agreement. Baldus was well aware that partnership contracts were often abused to circumvent the usury prohibition in money-loans. In that case, one party was safe from losses while benefitting from the profits. Although he did not expressly use the term ‘triple contract’, Baldus firmly rejected partnerships in which the capitalist stipulated that the merchant guaranteed his capital and still granted him a share in the profits. Those contracts ‘smelled the pravity of usury’ and went against the nature of the partnership contract¹⁰². As to its form, this was a *mutuum* and not a *societas*.

So how is Lessius going to argue against this traditional line of thought? As a preliminary remark, it should be noted that at the outset of his discussion on partnerships, he had already stated that the natural elements of the partnership are subject to change by virtue of the parties’ mutual consent. Just as Johannes Eck, Lessius emphasized that the nature of the contract existed merely as a default rule. As long as the substance of the contract is not violated – partners agreeing to contribute something in order to pursue a common project

¹⁰⁰ A case in point Ettore Felici’s treatise on associations and partnerships, the introduction of which is entirely dedicated to an Aristotelian-Thomistic and Ciceronian analysis of *societas* as a form of *amicitia*, cf. *Tractatus de communione seu societate, deque lucro item ac quaestu, damno itidem ac expensis*, Francofurti 1606, f. 2-7.

¹⁰¹ Baldus de Ubaldis, *Commentaria in quartum et quintum Codicis libros*, Lugduni 1585, ad C. 4,37,1, num. 3, f. 123v: ‘... societas habet instar fraternitatis; unde sicut inter fratres debet servari aequalitas, ita inter socios’; also referred to by A. Massironi, *Nell’officina dell’interprete, La qualificazione del contratto nel diritto comune (secoli XIV-XVI)*, p. 255, n. 200.

¹⁰² Baldus de Ubaldis, *Commentaria in quartum et quintum Codicis libros*, Lugduni 1585, ad C. 4,37,1, num. 29-30, f. 124v: ‘Nono quaero, quid de his qui mutant pecuniam ad negociandum hoc pacto, quod capitale sit salvum et si lucrum interveniat dividatur? Respondeo, iste contractus sapit usurariam pravitatem, et ideo quicquid percipitur de lucro extenuat sortem. Non est enim haec societas, neque ex forma contractus, neque ex natura. Ex forma non, quia est contractus mutui; ex natura non, quia est contra naturam societatis quod unus habeat capitale salvum et alius capital fractum (...).’

– the *natura contractus* can be altered¹⁰³. Consequently, the ‘profit-loss-sharing-principle and the equal division of the profits do not apply if partners expressly agree otherwise. Partners are free to adapt the third and fourth requirement of partnership contracts, on condition that the obligation (*onus*) which exceeds the nature of the partnership contract is duly compensated¹⁰⁴. According to Lessius, the triple contract provides such a compensation. The extra burden put on the merchant, which derives from the fact that he has to insure the capital, is compensated by a benefit that is of equal value, namely the price of the insurance. Moreover, the obligation to guarantee the principal does not derive from the partnership contract, but from a new contract, namely the insurance contract¹⁰⁵. Hence, the safety enjoyed by the investor does not turn the partnership itself into a *societas leonina*. As regards the objection that the capitalist would not have deposited his money with the merchant unless he was sure about the guarantee, Lessius simply states that everybody is free (*liberum*) not to be prepared to enter into contract x without concluding another contract y¹⁰⁶.

Lessius takes the argument even a step further. Not only is the merchant not in a relatively bad position, he is actually better off thanks to his duty to guarantee the principal. As a result, merchants often do not want to enter into a partnership but on the conditions inherent in a triple contract. According to Lessius, the merchants like this kind of deal (*mercatores sic malint*), since it enables them to make more profits¹⁰⁷. In addition, merchants do not care too much about the burden of insurance, as they know how to spend their money in safe business affairs. On the other hand, they think to themselves that, even if they go bankrupt, the capitalist will share in the losses, too, since the obligation is not backed up by a real security. Lessius observes that this is something which frequently happens in practice (*quod saepe fieri videmus*). Moreover, Lessius finds that the merchants readily agree to buy the future profits at a fixed annual price, since they are driven by the hope to make many times more money with the capital that is entrusted to them (*sperant se multo plus lucraturos*)¹⁰⁸. Last but not least, the guarantee dispenses merchants with ordinary accountancy regulations. Consequently, they

¹⁰³ This principle was also defended by Jakob Henrichmann, who explicitly relied on the theologians for taking this view; cf. *Consilia sive responsa iuris*, Dilingae 1566, 8, 50.

¹⁰⁴ Cf. supra.

¹⁰⁵ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 28, p. 339: ‘Sed neque ex secundo, nimis quod mercator obligetur ad aliquid supra naturam contractus societatis vel conductionis operarum. Primo, quia non obligatur ad hoc ex vi contractus societatis aut conductionis (...), sed obligatur ex alio contractu in quo nova datur compensatio aequalis illi gravamini.’

¹⁰⁶ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 28, p. 339: ‘Nec refert, quod sine hoc contractu assecutionis nolit depositor pecuniae inire contractum societatis aut conductionis operarum mercatoris. Cuique enim liberum, nolle inire unum contractum sine alio, v.g. contractum venditionis sine contractu redimendi, aut contractum venditionis unius speciei sine venditione alterius speciei, etc.’

¹⁰⁷ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 28, p. 339: ‘Accedit quod mercatores sic malint quam aliter. Maius enim lucrum sic percipiunt. Assecutionem enim sortis saepe non magni aestimant, quia norunt eam secure impendere, vel si exponunt eam periculis et res male cesserit, cogitant se non fore solvendo, ac proinde depositorem fore damni participem. Quod saepe fieri videmus.’

¹⁰⁸ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 28, p. 339: ‘Lucrum autem incertum, quod illis offertur, libenter certo pretio redimunt, quia sperant se multo plus lucraturos. Et tales venditiones et emptiones rerum non habentium certum eventum inter eos sunt creberrimae.’

are eager to agree to a commercial credit that takes the form of triple contract, since in that case they do not have to disclose their accounts¹⁰⁹.

In light of Lessius' fierce defence of the triple contract, it would almost seem as if his refutation of the third possible objection against the triple contract were superfluous. It remains important, though, because the accusation of 'implicit usury' (*mutuum implicitum*) was the most common objection raised against the triple contract throughout the centuries. We have seen this argument in Baldus and it was revived in the sixteenth century by Domingo de Soto. The famous theologian from Salamanca argued that ownership was dependent on risk¹¹⁰. As a consequence, he considered the merchant who promised to return the capital to the investor as the owner of the capital, since the merchant ran the capital risk. Soto re-interpreted the triple contract as a *mutuum*, and considered the annual profits granted to the investor as usurious interests. On the other hand, Soto allowed an investor to conclude a partnership contract with a merchant and an insurance contract with another person¹¹¹. In that case, Soto believed, the partnership was not converted into a *mutuum*. For him, just as for his master Francisco de Vitoria (1483/1492-1546), it made a huge difference whether the agreements that constitute a triple contract were concluded with a different person or among the partners¹¹².

Lessius attacked the juridical inconsistencies in Soto's reasoning. He fiercely rebuked Soto's opinion that ownership is lost and that an implicit money-loan is created by virtue of the insurance that is to be provided by the merchant who receives the money¹¹³. As proof for the fact that the investor remained the owner of his money, he pointed out that when the merchant went bankrupt, the investor had the right to claim back his money prior to the other creditors and that he could exercise a *reivindicatio*¹¹⁴. Lessius also argued that ownership is lost no more in an insurance contract concluded with a partner than in an insurance contract with a separate person. Justice is a virtue that concerns the equality between goods. It is an objective and not a subjective virtue. Consequently, agreements that are just when concluded with several persons are also just when they are concluded at once with a single

¹⁰⁹ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 28, p. 339: 'Adde, quod ex tali contrahendi formula non cogantur rationes suas et computus aliis patefacere.'

¹¹⁰ Soto, *De iustitia et iure*, Salmanticae 1562, lib. 6, quaest. 6, art. 2, p. 562: 'Haec non est societas, sed vere mutuum. Eo enim ipso quod alter periculum tuae pecuniae subit, efficitur pecuniae dominus. Nam ille vere est dominus cui res perit, si perdatur, et ideo quicquid ultra capitale mutuator ille recipiat, fit usurae reus, atque hic fit nullam esse societatem.'

¹¹¹ Soto, *De iustitia et iure*, lib. 6, quaest. 6, art. 2, p. 563: 'Cum enim ego uni trado pecuniam meam et cum altero paciscor de assecutione, neutri re vera mutuo: nam ille cui trado non tenetur mihi restituere atque adeo non transfero dominium in ipsum; alter vero qui restituere tenetur, non recipit meam pecuniam.'

¹¹² García Ulecia, *El contrato trino*, p. 135-136.

¹¹³ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 28, p. 339: 'Falsum est, quod ratione assecutionis praestanda a mercatore cui datur pecunia, amittatur dominium, et fiat implicitum mutuum, ut putat Soto.'

¹¹⁴ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 39, p. 340: 'Si contingat mercatorem non esse solvendo, depositor potest ante omnes creditores pecuniam suam, si adhuc inveniatur, extrahere tamquam rem suam, et si surrepta fuerit, actione in rem illam vindicare. Quae omnia sunt aperta signa dominii et nullum hic esse mutuum.'

person¹¹⁵. At the same time, this was a rejection of Tommaso da Vio Cajetanus's (1469-1534) opinion according to which the three agreements that made up a triple contract could not be concluded at once as a single contract. Cajetan allowed of triple contracts concluded among the same partners provided that the three agreements were entered into successively (*ex intervallo*), but not if they were concluded as a single contract *sui generis*. According to Lessius, this was manifestly false¹¹⁶: 'Whether they occur at once or successively does not alter the justice of the agreements, as long as equality and freedom are observed.'

At the end of this analysis of Lessius' argumentation in favor of the triple contract, there is but one conclusion to be made: Lessius adamantly defended the justice of the triple contract against all possible objections. He claimed that commercial credit could be granted to a merchant by means of a partnership contract to which insurance and purchase agreements were added so as to guarantee favorable investment conditions to the capitalist. Lessius expressly wanted the merchant to spend the capital raised through a *contractus trinus* on commercial projects¹¹⁷. His colleague and friend Molina insisted even more on this condition¹¹⁸. But once this condition was met, Lessius firmly denied that intending to conclude a triple agreement rather than a money-loan was a sinful attempt to escape the usury prohibition. What Lessius wanted legal and moral rules to achieve, is raise the incentives for people and institutions with money to invest their savings in a fruitful way by channeling it to merchants who needed credit for running their businesses. In Lessius' view, the triple contract provided capitalists with just such an incentive. It allowed them to invest their money in a safe and lucrative way without violating the usury prohibition.

6. "Libertas mercatoria" and the Specific Justification of the Practice in Belgium

The reason why Lessius argued so eagerly in favor of the triple contract is revealed at the end of his defense. Just like other theologians before him, such as Eck and Molina, Lessius was concerned with the legitimization of business practice, particularly in Antwerp and in Italian cities. Faced with a huge discrepancy between traditional legal categories, on the one

¹¹⁵ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 30, p. 340: 'Quae enim inita cum diversis iusta sunt, etiam cum eodem iusta sunt, si ille sic contrahere sponte sua cupiat (...). Iustitia enim consistit in aequalitate rei ad rem, non in habitudine ad personam seu subiectum.'

¹¹⁶ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 30, p. 340: 'Simul vel successive fieri non mutat iustitiam pactorum, modo semper servetur aequalitas et utrimque libertas.' Compare Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 22-23, p. 337.

¹¹⁷ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 29, p. 340: '(...) mercator non potest illam [sc. pecuniam] in alios usus quam in mercimonium impendere, alioquin tibi iniuria facit et tenetur quanti tua interest, non fuisse hic impensam. Unde verum non est, illum ea pecunia posse emere praedium, aut dotare filiam, quia non est illi ad eum usum concessa, nisi id faciat cum animo mox aliam eius loco substituendi, quo modo etiam deposito uti licet, cuius tamen dominium non amittitur.'

¹¹⁸ Molina, *De iustitia et iure*, tom. 2, tract. 2, disp. 417, num. 10, col. 757.

hand, and new business customs, on the other hand, Lessius radically advocated the primacy of commercial practice¹¹⁹. Indeed, Lessius' contemporary Zypaeus observed – much to his regret – that the freedom of the merchants (*libertas mercatoria*) frustrated attempts made by secular and ecclesiastical regulators over more than a century to abolish the triple contract¹²⁰. Contrary to Zypaeus, Lessius was not unhappy with merchantile practice. He was more anxious to protect the freedom of the merchants than to aggravate the burdens imposed by legislators. This is not unlogical, since along with other theologians he elevated freedom into the founding principle of contract law¹²¹. Lessius concludes his argumentation in a very pragmatic fashion, then, by finding that the following contractual formula, which he claims was international practice in Italian cities and in Antwerp, is tantamount to a triple contract, and, hence, not inequitable¹²²:

I, the undersigned, acknowledge by means of this evidence of debt that I have received 1000 guilders from X to invest them in a lawful business project. Instead of the major, but uncertain profits that could be due to X on account of this business, I promise to give him 6 ¼ per cent on an annual basis and to insure him against the risk of capital.

Lessius was well aware of the resistance that this kind of contractual formulas met with in less business-minded circles of his time. In fact, it was the abundant presence of authorities who opposed the triple contract that had motivated Lessius to leave his habit of treating subjects in the most succinct way possible and to dwell a little bit longer on the partnership contract¹²³. Lessius warned these conservative authorities that their opinion was completely out of touch with reality and that it was going to harm the interests of society (*cuius prohibitionem hoc tempore cum damno publico futuram non dubitaverim*). Interestingly, just as in Eck's time, the jurists appeared to play no minor role in the promotion of those conservative ideas. Although, perhaps deliberately, Lessius did not mention specific names, two major authorities in Antwerp at his time could be named as proponents of a more rigorous approach to the practice of the triple contract. The first one is the Italian jurist Ettore Felici (Felicius). The second one is the Belgian jurist François van der Zypen (Zypaeus)¹²⁴.

¹¹⁹ W. Decock, *Leonardus Lessius (1554-1623) y el valor normativo de 'usus et consuetudo mercatorum' para la resolución de algunos casos de conciencia en torno de la compra de papeles de comercio*, in: M. Madero – E. Conte (eds.), *Entre hecho y derecho, Tener, poseer, usar en perspectiva histórica*, Buenos Aires 2010, p. 75-94

¹²⁰ Zypaeus, *Notitia iuris belgici*, lib. 4, tit. *De usuris et nautico foenore*, p. 108.

¹²¹ For further explanation, please allow us to refer to W. Decock, *Theologians and contract law, The moral transformation of the ius commune (ca. 1500-1650)*, [The Legal History Library, 9; Studies in the History of Private Law, 4], Boston-Leiden 2012.

¹²² Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 30, p. 340: 'Constat, formulam illam, quae in Italia et Antverpiæ variis linguis circumfertur, non esse iniquam, continet enim tres illos contractus, estque talis: Ego infrascriptus confiteor hoc meo chirographo me accepisse a Titio mille aureos ut eos impendam legitimae negotiacioni, et loco incerti lucri maioris, quod illi ex hac negotiacione posset competere, promitto me illi daturum 6 et ¼ in centum quotannis, et eiusdem summae periculum praestituru.'

¹²³ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 33, p. 342: 'Haec fusius preter meum morem persecutus sum, quod videam adhuc a quibusdam propter umbras quasdam usurae hunc contractum damnari, cuius prohibitionem hoc tempore cum damno publico futuram non dubitaverim.'

¹²⁴ For an extensive biographical account of Zypaeus including references to further literature, see R. Lesaffer, *Iudex, magistratus, senator (1633), Franciscus Zypaeus over het publiekrecht*, in: E.-J. Broers – B. Jacobs (ed.),

Felici dedicated no less than two chapters or almost fourty pages of his *Tractatus de communione seu societate* to the condemnation of commercial credit agreements in which the capital was insured by the working partner. Felici explicitly endorsed Domingo de Soto's opinion that constructions such as the triple contract should be un-masked as implicit and usurious money-loans¹²⁵. He extensively discussed Dr. Navarrus' defense of the triple contract, only to conclude that Soto's was the safer opinion. Felici quite dishonestly claimed that the common opinion of the theologians was that the triple contract needed to be considered as usurious¹²⁶. He even tried to support his rejection of the triple contract by invoking his loyalty to the Church: 'in all affairs I subject myself to the resolution of the Holy Church' (*in omnibus me subijcio determinationi Sanctae Ecclesiae*)¹²⁷. Probably he was thinking of Pope Sixtus V's bull *Detestabilis avaritia* (1586), which condemned the triple contract. Although Felici recognized that the use of the triple contract had established itself as a widespread commercial custom, he nevertheless thought that custom could not excuse from sin¹²⁸. Finally, he rejected the argument that the triple contract did not violate the *natura contractus*, nor did he recognize the doctrine of implicit intention¹²⁹ – two pillars of Eck's and Lessius' defense of the triple contract.

Equally dismissive of guaranteed commercial credit was Zypaeus. In his overview of contemporary Belgian law, the *Notitia iuris Belgici* (1635), the canonist from Antwerp discussed the triple contract in a chapter on usury¹³⁰. With sensible reluctance, he admitted that Leonardus Lessius had defended the triple contract with great erudition. Moreover, he recognized that Lessius had persuaded Johannes Malderus, the bishop of Antwerp (1611-1633) – and Zypaeus' superior on that account – to adopt the same, permissive view. Zypaeus made Lessius' and Malderus' appear marginal by pointing out that the triple contract was a contractual form 'besieged' (*oppugnata*) by the other authorities. Furthermore, he emphasized that canon law and statutory law had repeatedly tried to stamp out the practice whereby people deposited their money in exchange for a part of the profits and with the possibility of claiming the principal back. He also added considerable weight to the bull *Detestabilis avaritia*, even though he also recognized Lessius' and Malderus' benign interpretation of it¹³¹. Regardless of

Interactie tussen wetgever en rechter voor de Trias Politica, Den Haag 2003, p. 31-35.

¹²⁵ E.g. Felici, *Tractatus de communione seu societate*, cap. 18 (*An valeat pactum, quod capitale sit salvum [et non sit suppositum periculo] et inde lucrum percipiatur?*), num. 7, p. 197; cap. 19 (*An pactum, quod capitale sit salvum in totum vel in parte aliquot modo iustificari possit?*), num. 14, p. 214-215; num. 26, p. 217.

¹²⁶ Felici, *Tractatus de communione seu societate*, cap. 18, num. 8, p. 198; num. 54, p. 205.

¹²⁷ Felici, *Tractatus de communione seu societate*, cap. 18, num. 66, p. 207.

¹²⁸ Felici, *Tractatus de communione seu societate*, cap. 18, num. 31-51, p. 202-205.

¹²⁹ Felici, *Tractatus de communione seu societate*, cap. 18, num. 20-23, p. 200; num. 71-72, p. 208.

¹³⁰ Zypaeus, *Notitia iuris belgici*, lib. 4, tit. *De usuris et nautico foenore*, p. 107-108: 'Sed et usurarios contractus imminuisse multis videtur in usum frequentem nuper vocatus contractus triplex, societatis, assecurationis et certi pro incerto lucre pactum, ut scilicet quis mercatori centum in societatem conferat, eam sortem mercator securam | faciat et in vicem decem forte aut quindecim, quae societas parere posset, quotannis mercator solvat sex.'

¹³¹ Zypaeus, *Notitia iuris belgici*, lib. 4, tit. *De usuris et nautico foenore*, p. 108: 'Quam canones et Caroli V edictum vetuit, quando sors collocatur cum lucro et facultate repetendi. Et diserte Pontifex Romanu.

the theoretical debate, Zypaeus advised to abstain from the triple contract in practice because it was not easily going to be accepted as legitimate in the external court and in the court of conscience¹³². To this effect, he cited a negative precedent from the Great Council of Malines and an instruction for confessors issued by the Synod of Antwerp in 1609 that demanded careful examination of consciences¹³³.

As mentioned before, Zypaeus ended his account of the triple contract with the bitter remark that the contractual form for money-loans prescribed by statutory law was not followed by the merchants in practice (*sed nec eam libertas mercatoria servat*). It was this ‘commercial freedom’, precisely, which Lessius avidly defended. He was realistic enough not to try to impose pointless measures. Moreover, he thought that these top-down regulations were not only useless, but also extremely harmful for the community. Therefore, in a kind of *peroratio* to his defence of the triple contract, Lessius proposed to explain why he thought this practice was expedient, particularly in Belgium in his time. He distinguished between three forms of expediency¹³⁴. First of all, Lessius promotes the *contractus trinus* for the sake of the salvation of souls (*ad salutem animarum*). Secondly, the triple contract is thought to be advantageous to the political authorities and society as a whole (*ad commodum principis et reipublicae*). Thirdly, guaranteed commercial credit is very useful as a safe investment vehicle for widows and wards (*ad compendium viduarum et pupillorum*).

Far from being a danger to the soul, Lessius argued that the triple contract actually was a pathway to heaven. He invited sceptics to ponder what would happen to people living off their interests, if the possibility of safely investing private wealth in commercial credit contracts would disappear¹³⁵. The alternative was to buy rents, but what if this market became

Sixtus V, Constit. inc. detestabilem, data 12 Kalendas Nov 1586 damnavit, sed in futurum atque posthac, ut loquitur Const., non ut ex iure naturae usurariam, ut bene Malder. Adde quod ipsa Constit. praefatur de illis, qui speciosum et honestum societatis nomen suis foeneratiis contractibus praetexunt, atque ita de fraudulentis. Unde qui vere societatem non intendunt, non mercatoribus, nec in mercaturam dant, eo nomine non excusantur ab usura, quod quia saepe, ne dicam plerumque, fit; plenus periculi est hic collocandi modus.'

¹³² Zypaeus, *Notitia iuris belgici*, lib. 4, tit. *De usuris et nautico foenore*, p. 108: ‘Denique quidquid theoricē disputetur, praxis contractus triplicis non facile in iudiciis approbabitur, ut et in Concilio Magno improbata aliquando dicitur. Et E.4.Oct.1540 satis videtur adversari, et Paulus V iussit Sixti V const. observari, et Synodus Antwerp. 1609, t. 5, c.12. confessarii diligens examen iniungit.’

¹³³ Apparently, local synods on the Spanish mainland had also condemned the practice of the triple contract; cf. García Ulecia, *El contrato trino*, p. 134, n. 9. Brants, *Lessius et l'économie politique et sociale*, p. 311-312 briefly mentions the Antwerp synod of 1610 (sic), besides pointing out that Malderus lobbied for the prohibition of the triple contract in the official, written version of Antwerp customary law, even though he did recognize its lawfulness from a theoretical point of view. I am grateful to Dr Bram Van Hofstraeten for bringing this passage in Brants’ article to my attention.

¹³⁴ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 32, p. 341.

¹³⁵ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 32, p. 341: ‘Quod ad salutem animarum expedit, probatur, quia si haec form prohibetur, subtrahetur plurimis qui redditus non habent, nec venales inveniunt, ratio vivendi salva sorte, quam tamen omnes conservatam volunt. Itaque conferent se ad iniquas artes, ad occultas usuras, ad fraudes emptionum et venditionum, ad cambia sicca et facta, ad mohatras, monopolia, furta. Alii paucis annis sortem consument, sicque filiae non poterunt honeste elocari, nec filii in studiis liberalibus ali, alia incommoda sequentur.’

saturated, for instance through lack of alternative investment tools? People who did not possess rents or could no longer find them would then lose their means of living with the guarantee that their capital was safe (*ratio vivendi salva sorte*). Yet, in the end, everybody would still want to find a means of safely investing his private wealth. According to Lessius, the end-effect would be that these people would then commit themselves to truly inequitable practices, such as dry exchange or *mohatra* contracts, secretly charge usurious interest rates, commit fraud in buying and selling, create monopolies, steal, etc. He also referred to the danger that people would simply consume their wealth without saving it for long term needs. Consequently, they will not be able to let out their daughters to be employed in honorable jobs, they will not be able to send their sons to school, etc.

So Lessius insisted that some sort of safe investment vehicle needed to be on offer for people with surplus funds to prevent them from squandering their private wealth or resorting to truly inequitable means of making profits. This is also the reason why he thought triple contracts were the appropriate means for ‘widows and wards’ to safely invest their funds at a reasonable profit rate¹³⁶. He acknowledged that even triple contracts were not insulated from risk, but he thought that the widows and wards who would lose their means of existence because the merchant with whom they deposited their money went bankrupt, was a relative minority¹³⁷. Moreover, merchants mostly went bankrupt only after a couple of years of activity, so that in the meantime widows and wards would at least have reaped the annual profits.

Lessius also reasoned that the absence of the triple contract would negatively affect society as a whole. For given that merchants were often called upon to lend money to the prince for the purpose of financing communal projects, the costs that merchants incurred in raising funds indirectly determined the interest rates at which the political authorities could borrow money from the merchants. If merchants were going to lose the option of raising money at relatively advantageous conditions through triple contracts, then the burden of finding more expensive credit would ultimately be shifted on the community. Lessius warns that if safe commercial credits in the form of triple contracts are prohibited, the merchants will be obliged to raise funds through bills of money-exchange, the cost of which can rise as high as 12, 14, or 18 per cent and more on an annual basis¹³⁸. Therefore, they will charge higher inter-

¹³⁶ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 32, p. 341: ‘Quod etiam ad commodum viduarum, pupillorum et plurimorum aliorum, quia alia ratione fructuose suam pecuniam non possunt impendere, expedit hunc contractum permittere, constat ex dictis. Alioquin consument sortem et tandem redigentur ad inopiam vel ad turpia lucra se convertent.’

¹³⁷ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 33, p. 341: ‘Nec obstat, quod aliquos contingat una cum mercatoribus everti, quia hic pauci sunt ad reliquos qui non evertuntur. Deinde non statim evertuntur, sed plerumque post multos annos, quando iam diu fructum percepunt, ac si vivere debuissent ex capitali, non minus post aliquot annos ad inopiam vergere coepissent.’

¹³⁸ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 32, p. 341: ‘Quod ad commodum principis et reipublicae attinet, patet. Si enim hic contractus prohibitus fuerit, non poterunt mercatores principi suppedare pecuniam, nisi sub maximis detrimentis. Cogentur enim omnem fere pecuniam accipere aliunde per cambia, quorum pretia in annum saepe excrescent ad 12, 14, 18 vel amplius in centum. Unde etiam multo amplius nomine cambii vel interesse exigent a principe.’

est rates on loans granted to the prince. The reason that the prince can now borrow at relatively low interest rates, is because the merchants, his main creditors, can now raise money at 6,25 thanks to the *contractus trinus*¹³⁹.

In conclusion, Lessius argued that the prohibition on the triple contract would cause serious harm to the entire credit system of the Belgian society. It would also endanger the salvation of the soul rather than promote it. However, even if rational argument pleaded in favor of the triple contract, there remained a serious legal obstacle to its recognition. In 1586, Pope Sixtus V had condemned the practice of guaranteed commercial credits in his bull *Detestabilis avaritia*, in which he considered the *contractus trinus* as an artificial legal device to evade the usury prohibition in money-lending¹⁴⁰. Lessius nevertheless easily dispensed with this argument from authority. In his eyes, the bull was in blatant contradiction with commercial practice in Italy and Belgium¹⁴¹. He inferred from this that the bull had never truly been received in these regions. Particularly in Belgium, the bull was never promulgated or recognized in practice – and practice prevailed on pointless legislation. By the same token, he argued, the bulls published by Pius V which severely limited the sale of rents (*census*) had not been received in practice. Lessius' reasoning might seem anti-authoritarian, disloyal and even provocative. The truth is, though, that the argument of non-reception of papal legislation was widespread among theologians and canonists of his time, certainly with regards to the bull *Detestabilis avaritia*¹⁴².

7. Conclusion: What Kind of Story is the Hidden Story?

The aim of this contribution has been to draw attention to the Catholic moral theological literature on *societas* in early seventeenth century Antwerp, particularly in the work of Leonardus Lessius, the 'Oracle of the Netherlands'. Since this type of sources is not frequently considered in standard legal historical accounts on the origins of commercial law, we initially described the theological tradition on commerce and contracts as the 'hidden story' in the history of company law. At the end of the encounter with Lessius' exposition on partnerships

¹³⁹ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 32, p. 341: 'Cum autem h̄c in patria accipiunt pecuniam triplici illo contractu a viduis, pupillis et aliis, qui eam aliter impendere utiliter non possunt, ordinarie solum solvunt 6 et 1/4 in centum, secundum rationem reddituum. Et ita minus interesse exigunt a principe. Itaque hic contractus maxime redundat in commodum principis et reipublicae.'

¹⁴⁰ Sixtus V, *Detestabilis avaritia*, in: Bullarum, diplomatum et privilegiorum sanctorum Romanorum Pontificum Tauriensis editio, Torino 1863, vol. 8, p. 783-785.

¹⁴¹ Lessius, *De iustitia et iure*, lib. 2, cap. 25, dub. 3, num. 33, p. 342: 'Quia non obstante hac constitutione, in Italia maxime viget et semper viguit ista forma contrahendi, et passim schedulis impressis extat et versatur in omnium manibus. Unde patet illam constitutionem vel numquam ibi fuisse receptam vel certe non vetare hanc formulam, sed alio spectare. Multo minus fuit recepta h̄c in Belgio, ubi neque fuit umquam promulgata neque cognita.'

¹⁴² Noonan, *Scholastic analysis of usury*, p. 220-221.

and triple contracts, the question needs to be addressed what kind of story the hidden story tried to tell at the time when it was told. It appears that this question can be answered fairly unambiguously: Lessius' aim was to *legitimize* the ordinary but officially contested business practices of his time. On grounds of moral and economic expediency, he defended the widespread use of safe commercial credit by virtue of triple contracts, which virtually comprised a partnership (*societas*), an insurance contract (*asscuratio*) and the purchase of potential profits (*emptio spei*).

The early modern history of *societas*, then, cannot be reduced to a story about the origins of typically modern features of partnerships, or rather, of companies in a Weberian sense, e.g. limited liability¹⁴³. It is also part of the story of how money can be lawfully put to its most productive use in a society that is imbued with Christian values. The conclusion of this paper confirms Endemann's assumption that ignoring the religious roots of the Western legal tradition comes at a high price. Precious references to mercantile practices in the Antwerp market in the early seventeenth century are contained in Lessius. Also, too dogmatic a distinction between 'law' and 'morality' runs the risk of ignoring the intellectual dialogue that took place between both 'theologians' and 'jurists' – a glimpse of which has been given in this paper with reference to Ettore Felici's discussion on *societas*. Yet, most of all, Lessius' defense of commercial capitalism reveals that legal techniques and commercial practice are in constant need of legitimization. Moreover, legitimization strategies alter over time, therefore reflecting some of the most deep-seated yet often unspoken assumptions that underlie legal institutions over time. Apparently, theologians played a major role in the process of preparing and legitimizing developments in legal practice in the sixteenth and seventeenth centuries¹⁴⁴. Salvation of souls mattered at least as much as economic efficiency.

The fascinating thing about Lessius is that throughout his elaborate argumentation in defense of the triple contract he displays a startling mastery of economic analysis besides demonstrating impressive lawyering skills. In Lessius' view, sound moral theology cannot do without law and economics. Up to a certain extent, this turns the theologian from Antwerp almost into a father of the 'Law and Economics Movement' – although he would never have subscribed to the exclusively utilitarian tenets on which the modern movement rests. In many respects, Lessius was a bridge-figure: he tried to mediate between traditional morality and new commercial practices, between economic analysis and legal principles. His thinking was never as uncompromising as rigorous moralists would have wished, but neither did he think that merchants could be left on their own without the expert advice of a theologian. His method of solving cases was relational in an etymological sense, that is comparative and pragmatic. Not only did a comparative cost analysis precede his conclusion about the just division of the profits in a partnership, his method of analyzing the legal instrument called

¹⁴³ This is obvious not only from Lessius' discussion of *societas*, but also from the papers by Dave De ruyscher, Stefania Gialdroni, Martijn Punt and Bram Van Hofstraeten which were presented at the Symposium (see above, note 1).

¹⁴⁴ Compare Petit, *Del usus mercatorum al uso de comercio*, p. 14-15 and Massironi, *Nell'officina dell'interprete*, p. 258, n. 210 (containing references to further literature).

contractus trinus was also related to a comprehensive view of the entire moral, economic, legal and sociological context in which this legal device operated.

Lessius defended the practice of capitalists providing commercial credit without having to fear the loss of their funds and with the certainty of benefitting from a fixed annual profit. Capital-service partnerships in which the merchant insured the capitalist and paid a fixed annual interest were a legitimate way to escape the usury prohibition. Lessius thought that commercial capitalism was the answer to the material and the spiritual needs of Antwerp in his time. In Lessius' treatise *On justice and right*, we see the definitive breakthrough of an economy that is fuelled by commercial enterprise and financial innovations. His was a society in which the usury prohibition had become obsolete and in which capital made its appearance 'to claim back its rightful yet long suppressed role' on the stage of life¹⁴⁵. There is no doubt that Lessius 'would have felt at ease in a modern financial world'¹⁴⁶.

¹⁴⁵ W. Endemann, *Die Bedeutung der Wucherlehre, Ein Vortrag gehalten im wissenschaftlichen Verein zu Berlin*, Berlin 1866, p. 53-54: 'Dem Kapital ist sein lange unterdrückt gewesenes Recht wieder geworden, und aus dem, was über die Vergangenheit gesagt werden musste, ergiebt sich, welche andere Wirtschaftswelt nun vor uns liegt. Mit der Wiederherstellung des nussbaren Kapitals ist die Periode, welche das gesammte wirtschaftliche Leben nur oder vorzugsweise auf den Grund und Boden hinweisen wollte, überwunden. Gewerbe und Handel sind nun gleichberechtigte Gattungen | der Produktion, so nothwendig, dass selbst die Landwirtschaft, worüber sich der Kanonist entsetzen müsste, ohne das merkantile Element nicht mehr zu existieren im Stand ist.'

¹⁴⁶ Noonan, *Scholastic analysis of usury*, p. 222.